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In the Supreme Court of the United States

FORD MOTOR COMPANY, *Petitioner*,

v.

DOLORES CLAY, AS ADMINISTRATRIX OF THE ESTATE OF KATHLEEN P. CLAY, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a trial court presented with a motion to exclude expert testimony as unreliable under Federal Rule of Evidence 702 and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is required to provide a reasoned explanation on the record concerning its decision to admit or exclude the testimony.

2. Whether a trial court's "broad latitude" to decide "how to determine an expert's reliability" (*Kumho Tire Company* v. *Carmichael*, 526 U.S. 137, 152-153 (1999)) includes the discretion to ignore a clearly applicable *Daubert* factor that points toward the unreliability of an expert's methodology on the ground that the jury can always consider the factor in evaluating the weight of the expert's testimony.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court of appeals were:

1. Ford Motor Company;
2. Dolores Clay, as Administratrix of the Estate of Kathleen P. Clay;
3. John D. Strom, as Administrator of the Estate of Christopher J. Strom; and
4. William R. Slonsky.

Pursuant to Supreme Court Rule 29.6, petitioner Ford Motor Company states that it has no parent company, and that no publicly held company holds 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 215 F.3d 663. The order of the district court denying Ford's motion *in limine* to exclude the testimony of plaintiffs' expert (App., *infra*, 26a-30a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2000. A timely petition for rehearing was denied on August 15, 2000 (App., *infra*, 86a-87a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Federal Rule of Evidence 702 provides:

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Evidence 104 provides, in relevant part:

Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).

STATEMENT

This case raises important and recurring questions concerning the "gatekeeping" obligations of federal trial courts engaged in screening expert testimony for admissibility under Rule 702 of the Federal Rules of Evidence and this Court's decisions in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509

U.S. 579 (1993), and *Kumho Tire Company* v. *Carmichael*, 526 U.S. 137 (1999). The issues also have a substantial bearing on appellate review of the decision whether to admit such testimony under *General Electric Co.* v. *Joiner*, 522 U.S. 136 (1997). The Court should take this opportunity to resolve substantial conflicts in the circuits in this vitally important area of federal law.

In this product liability action arising out of a single-car accident, the plaintiffs won a multimillion dollar judgment against Ford Motor Company ("Ford") on the strength of their expert's testimony that the accident was caused by design defects in the vehicle. Although Ford raised serious questions about the reliability of the expert's methodology and sought to exclude the testimony under *Daubert*, the trial court summarily rejected Ford's motion, and overruled its renewed objections at trial, without offering *any* explanation of why the expert's testimony was admissible. In affirming, a divided panel of the Sixth Circuit acknowledged that this was a "close case" and that the trial court had failed to explain its rulings, but it inferred from the mere fact that the rulings were made that the trial court had faithfully discharged its "gatekeeping" obligations under *Daubert*. In dissent, Judge Ryan criticized the trial court's actions as "a clear example of a court improperly abdicating its gatekeeping function under *Daubert* * * * and *Kumho*." App., *infra*, 18a.

A. The Accident Underlying This Lawsuit.

On the night of June 18, 1995, William Slonsky, accompanied by three passengers, was driving a Ford Bronco II on Interstate 77 in Ohio. The vehicle had just been repaired after sustaining severe damage in another accident. Slonsky had never previously driven the vehicle; its owner, Sean Lance, who was riding in the front passenger seat, had asked Slonsky to drive because Lance had ingested five tablets of LSD earlier that evening. Slonsky and Lance were wearing seat belts but the two passengers in the back, Kathleen Clay and Christopher Strom, were unbelted. App., *infra*, 2a-3a.

Slonsky was driving 53 to 65 miles per hour when he moved to the right lane to allow a faster car to pass him. Immediately thereafter, the car in front of the Bronco II began decelerating, and Slonsky turned his steering wheel to the left to return to the middle lane. Slonsky testified that he felt the vehicle "jerk" or "overcorrect" to the left. He turned the steering wheel back to the right, perhaps as much as a full revolution, in an unsuccessful attempt to regain control. The vehicle rolled over several times. The unbelted passengers in the back seat both were ejected and died from injuries suffered in the accident. Slonsky and the vehicle's owner suffered only minor injuries. App., *infra*, 2a-3a.

B. The Proceedings in the District Court.

Dolores Clay and John Strom brought suit against Ford on behalf of the estates of their children.[1] Plaintiffs alleged that the Bronco II had a design defect that proximately caused the plaintiffs' injuries. The jury returned a verdict against Ford and awarded plaintiffs $17.5 million in compensatory damages, which was remitted to $10.5 million.

1. *The Testimony of Plaintiffs' Expert.* Plaintiffs relied heavily on the testimony of a single expert witness, Dr. Melvin Richardson, who opined that the accident was caused by design defects in the handling and stability of the Bronco II. Richardson, formerly a professor of engineering, had worked full-time as a litigation consultant since 1985. Although Richardson himself had never designed anything other than an okra picker that was never commercially produced (Pet. C.A. App. 1126-1127), he had testified as an expert in lawsuits alleging that a wide array of items, ranging from aircraft seat

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[1] Ford filed a third-party complaint against Slonsky, seeking indemnification and contribution, and Slonsky brought a counterclaim against Ford. Because Slonsky and the estates of Clay and Strom presented evidence jointly at trial, they are referred to in this petition collectively as "plaintiffs."

belts to lawnmowers to tobacco drying barns, were defective in design. *Id.* at 1253-1254, 1299. Richardson testified that "95%" of his work was on behalf of plaintiffs who were suing corporations and that, until recently, his work required him to give a deposition every 10-14 days. *Id.* at 1249, 1255-1256.

Richardson had never worked in the automotive industry and had never designed an automobile. Pet. C.A. App. 1133. He had never published an article on the handling and stability of vehicles (*id.* at 1251); all of his experience related to that subject was derived from his work as an expert witness (*id.* at 1252). In other cases, Richardson had opined that at least two other vehicles, the Suzuki Samurai and the Jeep Grand Cherokee, also had handling and stability defects. *Id.* at 1250.

At plaintiffs' request, the district court qualified Richardson as an expert in a variety of fields, including not only accident reconstruction but also mechanical engineering, vehicle dynamics, and machine design. App., *infra*, 6a. With regard to accident reconstruction, Richardson testified that his usual methodology consisted of two steps. First, Richardson gathered all available data and information about the accident, including the testimony of those involved in the accident and other witnesses, information about the "vehicles involved" and "their characteristics," information about other "physical * * * objects involved," and data about "the physical area" where the accident took place (including, for example, "what the road is like" and "how it's constructed"). Pet. C.A. App. 1127-1128. Second, Richardson "tak[es] all of the physical and factual information and appl[ies] the standard engineering techniques to that information to determine the most probable sequence of events that took place." *Id.* at 1128; see also *ibid.* (noting that second step would involve, for example, the application of "analytical techniques * * * to determine things such as speed").

In this case, Richardson acknowledged that he had never personally inspected the accident vehicle (relying instead on photographs taken by his son and by the police); had not visited the accident scene until the day before trial (*after* Richardson

had given his opinion in deposition); had been unable, during that 10-15 minute visit, to see the gouge marks from the accident because it was "close to dark" and traffic was heavy on the interstate so he had to remain on the shoulder; and had not, prior to forming his opinions, read the deposition of either Sean Lance (an eyewitness and front seat passenger) or the police officer who prepared the accident report. Pet. C.A. App. 209-210, 231, 1210-1214, 1282-87.[2] Nevertheless, based on his review of police reports and certain witness statements and deposition testimony, Richardson opined that when Slonsky changed lanes the second time, the vehicle turned sideways, started to slide, and then began to roll. *Id.* at 1219. Richardson did not attempt to determine how far Slonsky had turned the steering wheel in his evasive maneuvers; in fact, he did not even consider Slonsky's deposition testimony on that subject. *Id.* at 1299. As Richardson put it, "[w]e just know the vehicle got sideways and then it started flipping." *Ibid.*

Richardson also testified that the Bronco II turned sideways because of a handling defect and then rolled over because of several stability defects. Pet. C.A. App. 1243-1244. With respect to the handling defect, Richardson opined that the use of a rear stabilizer bar on the Bronco II caused "oversteer" (*i.e.*, sliding out of the vehicle on a turn). *Id.* at 1163-1165. As for the stability defects, Richardson first stated that the Bronco II's "stability index" — a figure calculated by dividing the width of the vehicle by the height of its center of gravity — was too low. *Id.* at 1155-1160. In addition, he stated that the design of the twin I-beam suspension caused the front end of the vehicle to elevate on a hard turn, raising the center of gravity (a phenomenon that Richardson called "jacking"). *Id.* at 1142-1145, 1184-1189.

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[2] Ford's expert on accident reconstruction, in contrast, "inspected the actual vehicle and visited the accident site several months before the trial." App., *infra*, 8a.

Richardson formed his opinion that the Bronco II had defects that caused the accident without the benefit of the tests that might have supported that opinion. For example, he did not attempt to determine through testing how the vehicle actually responded to specific driver inputs. Pet. C.A. App. 1259-1260, 1264, 1269-1270. He did not test other similar vehicles to determine whether they performed better. *Id.* at 1339-1340. And he did not demonstrate that the design changes he advocated would have averted the accident. *Id.* at 1350.[3]

2. *Ford's Objections To Richardson's Testimony.* Before trial, Ford filed a motion to exclude Richardson's testimony and requested a hearing under Rule 104 of the Federal Rules of Evidence. Pet. C.A. App. 205-219. Invoking *Daubert*, Ford contended that Richardson's testimony was insufficiently reliable to be admitted under Rules 702 and 703. *Id.* at 209, 212-213. Among other things, Ford argued that Richardson's accident reconstruction testimony was wholly speculative and based on a flawed and inadequate investigation (*id.* at 209-210) and that his opinions concerning the Bronco II's alleged design defects had neither been tested, nor published, nor subjected to peer review (*id.* at 212-213).

In response, plaintiffs did not dispute that Richardson's methodology lacked all of these hallmarks of reliability. Plaintiffs' Response to Defendant's Motion In Limine, at 1-9. Nor did they make any showing (or even claim) that Richardson's techniques were generally accepted in the fields of product design or accident reconstruction. See also *id.* at 4

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[3] Richardson did rely on a computer simulation that Ford ran on a *different* vehicle model, but it merely showed that the wheels of that vehicle *almost* left the ground when the driver performed a rapid series of violent turns on the steering wheel. He also relied on a videotape of another test, again performed by someone else, which showed that the wheels of another version of the Bronco II lifted slightly off the ground when the driver performed radical evasive maneuvers at high speeds. Pet. C.A. App. 1307-1311, 1237-1242.

(acknowledging that "there are engineering or automobile journals that may have published articles on Bronco II rollovers"). Instead, plaintiffs argued primarily that *Daubert* was limited to "scientific" testimony and thus "has nothing to do with this case." *Ibid.* Plaintiffs relied on various cases — including the Sixth Circuit's decision in *United States* v. *Jones*, 107 F.3d 1147, 1158 (6th Cir. 1997) — that were subsequently overruled by this Court in *Kumho*. See also App., *infra*, 5a n.3.

3. *The District Court's Rulings.* The district court rejected Ford's request for a hearing, but stated that it "reserves to itself the possibility of engaging in a brief voir dire" before Richardson testified. App., *infra*, 30a. When plaintiffs moved to qualify Richardson as an expert at trial, the court offered Ford an opportunity to engage in voir dire on his qualifications, but suggested that Ford's questions concerning the foundation for Richardson's opinions "would be best reserved for * * * cross-examination." App., *infra*, 32a. The court allowed Ford to maintain a "continuing objection" to the admissibility of Richardson's opinions on the subject of accident reconstruction. *Id.* at 32a-33a.

At the close of plaintiffs' case in chief, Ford moved to strike Richardson's testimony under *Daubert*. The district court overruled the objection without explanation. App., *infra*, 34a. At the close of all the evidence, Ford moved for a directed verdict on the ground that "Dr. Richardson's testimony regarding the design defect constitutes junk science which this Court should not consider." *Ibid.* The district court overruled this motion as well, again without any explanation. *Ibid.* Finally, Ford argued in its motion for judgment as a matter of law that Richardson's testimony should be disregarded as unreliable. The court once more declined to assess the reliability of the testimony. *Id.* at 37a-38a.

C. The Proceedings in the Court of Appeals.

1. A divided panel of the Sixth Circuit affirmed. App., *infra*, 1a-25a. At the outset, the majority explained that it would

review the district court's decision to admit Richardson's testimony only for abuse of discretion and would reverse "only if we are firmly convinced" that the lower court "erred." *Id.* at 4a (citing *General Electric Co.* v. *Joiner*, 522 U.S. 136 (1997)). The majority emphasized that "deference to the district court's decision 'is the hallmark of abuse of discretion review.'" App., *infra*, 4a (quoting *Joiner*, 522 U.S. at 143).

Turning to the district court's ruling, the court of appeals first observed that, under *Daubert* and *Kumho*, trial courts have a gatekeeping obligation to ensure that all expert testimony is both relevant and reliable. App., *infra*, 4a-5a. Although the majority acknowledged that "the district court did not explicitly recite that Richardson's testimony was relevant and reliable," it nevertheless concluded that the court's rulings on Ford's challenges to the testimony, which "squarely raised the issue of reliability," "indicate that it made that determination." *Id.* at 5a. The majority did not explain how that inference could be reconciled with the fact that plaintiffs' principal response to the *Daubert* challenge in the trial court was to argue that *Daubert* was inapplicable — a position that was consistent with Sixth Circuit law but that was subsequently "overruled" by this Court in *Kumho*. App., *infra*, 5a n.3. The majority also noted that Ford "had a full opportunity to cross-examine Richardson." *Id.* at 9a.

The court of appeals next summarily rejected Ford's critique of Richardson's methodology. After discussing Richardson's background qualifications in considerable detail, the majority explained that Ford had failed to show "how Richardson's failure to inspect the Bronco II or his late visit to the accident site undermine his methodology of accident reconstruction or render his testimony about this particular accident inadmissible." App., *infra*, 8a. The majority also dismissed Ford's critique of Richardson's methods for discerning design defect, stating, for example, that:

> [t]he district court, in its discretion, could have decided that Richardson's failure to test his theories went to the *weight*

> of his testimony regarding defects in the Bronco II, *not to its admissibility*.

Ibid. (emphasis added). Here again, the majority observed that "Ford was able to challenge the testimony regarding the alleged defects in the Bronco II through cross-examination." *Ibid.*

On the basis of this analysis, the Sixth Circuit upheld the district court's unexplained rulings because it was not "firmly convinced that the court abused its discretion by allowing Richardson to testify." App., *infra*, 4a. The court acknowledged, however, that this was "a close case." *Ibid.*

2. Judge Ryan dissented, observing that "this case presents a clear example of a court improperly abdicating its gatekeeping function under *Daubert* * * * and *Kumho*." App., *infra*, 18a. (citations omitted). Judge Ryan agreed that the district court was not required to conduct a *Daubert* hearing, but stated that it *was* obliged to make an initial assessment of relevance and reliability. Here, there was no such "initial assessment, and indeed * * * no express assessment at any time as to the reliability of Dr. Richardson's testimony." *Id.* at 20a. In Judge Ryan's view, "[t]he absence of such determination signals the trial court's failure to perform its gatekeeping function," which "alone constitutes an abuse of discretion." *Ibid.* Judge Ryan criticized the majority for improperly "substituting its own determination of reliability for that of the district court." *Ibid.*

Judge Ryan also disputed the majority's suggestion that it would have been within the district court's discretion to find Richardson's testimony reliable. *Daubert* and *Kumho*, Judge Ryan explained, require the proponent of expert testimony to produce "evidence that the methodology underlying the expert's conclusion is 'good science' or 'good engineering.'" App., *infra*, 23a. But the record here was "absolutely devoid of any indication that the process or methodology Dr. Richardson employed in reconstructing the accident" met that standard. *Id.* at 21a. Similarly, Judge Ryan found the record to be "devoid of any evidence showing that Dr. Richardson employed

recognized, reliable scientific or engineering methodology in reaching his conclusion that the Bronco II has handling and stability defects." *Id.* at 22a.

Indeed, according to Judge Ryan, there was no evidence that Richardson's methodology satisfied a *single one* of the indicia of reliability set forth in *Daubert* and *Kumho.* See App., *infra*, 21a-24a (noting that plaintiffs had failed to suggest any other considerations that pointed toward the reliability of Richardson's methodology). Judge Ryan was particularly troubled by Richardson's failure to test his theories, explaining that, "[a]t a bare minimum, *Daubert's* first factor – 'testing' or 'falsifiability' – will generally require an engineer to test his hypothesis of design defect." *Id.* at 22a (emphasis omitted).

Finally, Judge Ryan took issue with the majority's conclusion that the district court "could have decided" that the failure to test went to the weight, rather than the admissibility, of the testimony (App., *infra*, 24a) and with the majority's heavy reliance on Ford's "opportunity to cross-examine Dr. Richardson" (*id.* at 25a). He observed that it was unclear "how this point is relevant," because the opportunity to cross-examine an expert cannot "properly substitute for a trial court's gatekeeping function." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to clarify significant aspects of the trial court's obligation in evaluating the admissibility of expert testimony, including (1) the procedures that must be followed by the trial court in resolving challenges to expert testimony, and (2) the limitations on the trial court's discretion to decide *how* to determine admissibility. In *Daubert* and *Kumho*, this Court held that trial courts must act as "gatekeepers" with respect to expert testimony, ensuring that it meets the standards of FRE 702 before it may be presented to the jury. To perform that critically important function, courts must undertake a multifaceted analysis that focuses on whether the specific methodology employed by an expert witness is

reliable and whether the expert's testimony "fits" the case at hand. In *Joiner*, this Court made clear that the trial court's determination of admissibility should be reviewed for abuse of discretion.

As several courts of appeals have recognized, it is implicit in the Court's rulings that the analysis required by *Daubert* and *Kumho* must be undertaken *on the record.* Otherwise, it is simply impossible to tell whether the trial court has diligently conducted the required analysis or instead has impermissibly abandoned its gatekeeping role. Moreover, unless the trial court explains its rationale, it is impossible to determine whether its ultimate ruling rests on an error of law or otherwise constitutes an abuse of discretion. See *Koon* v. *United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). For these reasons, the Tenth Circuit is "convince[d]" of "the absolute necessity of district court findings on the record." *Goebel* v. *Denver and Rio Grand W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000).

The Sixth Circuit, by contrast, has ruled that a trial court need not explain its reasoning when applying "the exacting standards of reliability" that expert testimony "must meet" under *Daubert*. *Weisgram* v. *Marley*, 120 S. Ct. 1011, 1021 (2000). In the Sixth Circuit's view, the mere fact that a trial court has decided to admit or exclude expert testimony in the face of a challenge to its admissibility under Rule 702 is a sufficient basis for inferring that the trial court has discharged its gatekeeping obligations. That approach, if permitted to stand, would invite district courts to avoid the "subtle and sophisticated determinations" (*Joiner*, 522 U.S. at 147 (Breyer, J., concurring)) required by Rule 702 and would significantly impair the ability of federal appellate courts to carry out their reviewing responsibilities under *Joiner*.

To make matters worse, the Sixth Circuit did not stop at excusing the district court's unwarranted failure to offer any explanation of its ruling. It compounded that error by holding that the trial court would have been free to ignore a relevant

Daubert factor on the ground that the factor could always be considered by the jury — a rationale that amounts to nothing less than a license to ignore *Daubert* altogether. The court of appeals' holding is flatly inconsistent with this Court's direction, in *Kumho*, that a "trial court *should consider* the specific factors identified in *Daubert* where they are reasonable measures of the reliability of the expert testimony." 526 U.S. at 152 (emphasis added). By relying on this flawed rationale, the majority was also able to avoid giving any serious consideration to the failure of plaintiffs' expert to satisfy even a single one of the *Daubert* factors. Thus, there can be no assurance that *any* federal judge — apart from Judge Ryan, who discussed the *Daubert* factors in detail — engaged in any form of meaningful gatekeeping in this case.

I. THE SIXTH CIRCUIT'S HOLDING THAT A TRIAL COURT IS NOT REQUIRED TO MAKE EXPRESS FINDINGS UNDER *DAUBERT* CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND IS WRONG

A. The *Daubert* Framework

In *Daubert* v. *Merrell Dow Pharmaceuticals*, *supra*, this Court held that the Federal Rules of Evidence require trial courts to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. To qualify for admission under Rule 702, an expert's opinion must "have a reliable basis in the knowledge and experience of his discipline." *Id.* at 592. Thus, "[f]aced with a proffer of expert scientific testimony, * * * the trial judge *must determine at the outset*, pursuant to Rule 104(a)," whether the testimony is admissible. *Ibid.* (emphasis added).

The Court ruled in *Daubert* that, when expert testimony is proffered, the trial court must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."

509 U.S. at 592-93 (emphasis added). The "focus" of this preliminary assessment "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595. The Court identified several specific factors to be considered in making the admissibility determination, including (1) whether the theory or technique upon which the expert relies "can be (and has been) tested"; (2) whether it "has been subjected to peer review and publication"; (3) the technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has been generally accepted. *Id.* at 593-94. At the same time, the Court emphasized that this list of reliability factors was not intended to be exhaustive. See *id.* at 593.

In *General Electric Co.* v. *Joiner*, *supra*, the Court held that "abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude" expert testimony. 522 U.S. at 146. The Court also instructed that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Ibid.* In a separate concurrence, Justice Breyer observed that the gatekeeping obligation under *Daubert* "will sometimes ask judges to make subtle and sophisticated determinations," but cautioned that "the difficulty of the task" does not "excuse the judge from exercising the 'gatekeeper' duties." *Id.* at 147-48 (Breyer, J., concurring). "To the contrary," Justice Breyer explained, "when law and science intersect, those duties often must be exercised *with special care*." *Id.* at 148 (emphasis added).

Finally, the Court elaborated on the trial court's gatekeeping obligations in *Kumho Tire Company* v. *Carmichael*, *supra*, holding that this duty applies "not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." 526 U.S. at 141. The Court again emphasized the "importance of *Daubert*'s

gatekeeping requirement," noting that its essential objective is "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152. And the Court reiterated that the inquiry required is a "flexible" one in which the trial court "must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable." *Ibid.* This broad latitude allows the trial court "to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises." *Ibid.*[4]

In both *Joiner* and *Kumho*, the Court went on to consider whether the trial court had properly excluded the expert testimony at issue, concluding in each case that there had been no abuse of discretion. See 522 U.S. at 143-47; 526 U.S. at 153-158. In so doing, the Court provided the lower courts with a valuable illustration of the kind of careful and rigorous review of methodological reliability that *Daubert* requires. Thus, in *Joiner*, the Court, after faulting the proponent of the expert testimony for failing to "reply to" the "criticisms" raised by the defendant concerning the animal and epidemiological studies on which the expert relied, proceeded to discuss the problems inherent in each of these studies. 522 U.S. at 143-147. And in

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[4] In a concurring opinion, Justice Scalia, joined by Justices O'Connor and Thomas, added that the trial court's "discretion in choosing the manner of testing expert reliability" is not "discretion to abandon the gatekeeping function" or "to perform the function inadequately." 526 U.S. at 158-159. Rather, the trial court has "discretion to choose among reasonable means of excluding expertise that is fausse and science that is junky." *Ibid.*

Kumho, the Court carefully reviewed the lower court's reasoning concerning how the *Daubert* factors, and other indicia of reliability, applied to the expert at issue. In both *Joiner* and *Kumho*, it is difficult to imagine how this Court could have undertaken to review the trial court's ruling for abuse of discretion if there had been no explanation for that ruling.

B. The Circuits Are In Conflict Over The Trial Court's Obligation To Make Findings Under *Daubert*

In light of *Daubert*, *Joiner*, and *Kumho*, the trial court's gatekeeping function is uniformly recognized. The courts of appeals disagree, however, concerning the trial court's obligation, in performing that function, to state its reasons for admitting or excluding expert testimony. In the decision below, the Sixth Circuit held that a trial court need not provide any explanation for concluding that the *Daubert* standards have been satisfied or that the testimony of the challenged expert is based on a reliable methodology. Indeed, the court of appeals concluded that it would *infer* from the mere fact that the district court ruled on Ford's motion *in limine* and other challenges to Richardson's testimony that the court had faithfully executed its gatekeeping responsibilities. As we next explain, the Sixth Circuit's lax approach conflicts with decisions of at least three other circuits, all of which require the trial court to provide some determination on the record concerning the relevance and reliability of expert testimony.

1. The Tenth Circuit has squarely ruled that the trial court must make findings on the record before it rejects a challenge to the admission of expert testimony. In the Tenth Circuit, the admission of disputed expert testimony in the absence of such findings is, *per se*, an abuse of discretion necessitating a new trial.

In *United States* v. *Velarde*, 214 F.3d 1204 (10th Cir. 2000), for example, the defendant was convicted of aggravated sexual abuse of a child based on the expert testimony of a

pediatrician and a child psychologist. The trial court refused the defendant's request for a *Daubert* hearing on the ground that the proffered testimony was not "new or novel" (*id.* at 1208), and it made no findings on the record concerning the reliability or relevance of the expert testimony.

The Tenth Circuit reversed, ruling that the trial court had abused its discretion by admitting the testimony without expressly conducting a *Daubert* analysis. Although the court of appeals "recognize[d] that the trial court is accorded great latitude in determining how to make *Daubert* reliability findings before admitting expert testimony," it held that "*Kumho* and *Daubert* make it clear that the court must, on the record, make some kind of reliability determination." *Velarde*, 214 F.3d at 1209. Because the record "revealed no such reliability determination," even "when *Kumho* was specifically called to the court's attention" (*ibid.*), the Tenth Circuit concluded that the trial court "abused its discretion when it admitted the testimony." *Id.* at 1211.[5]

The Tenth Circuit applied the same rule in *Goebel* v. *Denver and Rio Grand Western Railroad Co.*, 215 F.3d 1083 (10th Cir. 2000). In *Goebel*, a physician testified that the plaintiff's brain damage was caused by exposure to diesel fuel exhaust during an accident in a railroad tunnel. The trial court denied defendant's motion *in limine* to exclude the testimony, without giving any reasons. When the defendant renewed the objection "on the basis of *Daubert*" after conducting *voir dire* of the witness at trial, the court overruled the objection, stating simply: "I believe there is sufficient foundation here for the jury to hear this testimony." *Id.* at 1087. The trial court disposed of defendant's post-trial motion to strike the testimony in equally

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[5] Having concluded that the trial court abused its discretion, the Tenth Circuit found it unnecessary to determine whether the testimony would have been admissible "had a proper reliability determination been made." 214 F.3d at 1211. Instead, the court of appeals reversed and remanded the case for a new trial.

cursory fashion, stating that the court had "fully considered the matter" when it denied the motion. *Ibid.*

The Tenth Circuit reversed and remanded for a new trial, holding unequivocally that "a district court, when faced with a party's objection, *must adequately demonstrate by specific findings on the record* that it has performed its duty as gatekeeper." *Goebel*, 215 F.3d at 1088 (emphasis added). The Tenth Circuit explained:

> While the district court has discretion in the *manner* in which it conducts its *Daubert* analysis, there is no discretion regarding the actual *performance* of the gatekeeper function. * * * Without specific findings or discussions on the record, it is impossible to determine on appeal whether the district court carefully and meticulously reviewed the proffered scientific evidence or simply made an off-the-cuff decision to admit the expert testimony.

Id. at 1087-88 (internal quotation marks omitted).

The Tenth Circuit thus has made clear that a trial court's summary denial of a defendant's motion, objections at trial, and post-trial motions are "insufficient as a basis for appellate review" of the admissibility of expert testimony. *Goebel*, 215 F.3d at 1088. The Tenth Circuit is "convince[d]" of "the absolute necessity of district court findings on the record." *Ibid.* In the absence of such findings, the Tenth Circuit will not determine for itself whether or not the testimony could have been admitted after a proper analysis under *Daubert*. See also *Dodge* v. *Cotter Corp.*, 203 F.3d 1190, 1200 n.12 (10th Cir.) (urging the trial court to "vigilantly make detailed findings to fulfill the gatekeeper role crafted in *Daubert*"), petition for cert. filed, 69 U.S.L.W. 3002 (U.S. June 20, 2000) (No. 99-2033).

The rule in the Tenth Circuit squarely conflicts with the Sixth Circuit's approach in this case. Here, as in *Velarde*, the trial court refused Ford's request for a *Daubert* hearing, and then failed to make any findings on the relevance and reliability of the expert testimony. Here, as in *Goebel*, the trial court

denied Ford's motion without disclosing its reasons, and then summarily denied renewed objections to the testimony at trial and in post-trial motions. However, the Sixth Circuit, unlike the Tenth Circuit, proceeded to ignore the trial court's failure to explain its rationale for admitting the expert testimony and, indeed, deferred to the trial court's unexplained ruling. There can be no doubt that if this case had been decided in the Tenth Circuit rather than the Sixth Circuit, Ford would have obtained a reversal and a new trial rather than an affirmance of a $10.5 million judgment.

2. Like the Tenth Circuit, the Eleventh Circuit has recognized the importance of the express application of the *Daubert* factors. The Eleventh Circuit has stated that trial courts should "make specific fact findings concerning their application of Rule 702 and *Daubert* in *each* case where the question arises, because such findings will facilitate this Court's appellate review." *United States* v. *Lee*, 25 F.3d 997, 999 (11th Cir. 1994) (emphasis added). District courts in the Eleventh Circuit have heeded that instruction. *Shepherd* v. *Michelin Tire Co.*, 6. F. Supp. 2d 1307, 1309 (N.D. Ala. 1997) (citing *Lee* and stating that it was "necessary for this court to make findings of fact pertinent to and that justify the non-admissibility of [the expert's] testimony"). The Tenth Circuit has cited and relied upon *Lee* as a basis for its own decisions in this area. See *Goebel*, 215 F.3d at 1088.

3. The Seventh Circuit also carefully examines the record to ensure that the trial court has diligently performed its gatekeeping function under *Daubert*. Thus, when reviewing a trial court's admissibility ruling, the Seventh Circuit first "review[s] *de novo* the question of whether the court properly followed the *Daubert* framework." *Ancho* v. *Pentek Corp.*, 157 F.3d 512, 515 (7th Cir. 1998); see also *Smith* v. *Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000) (concluding that the district court "properly applied the *Daubert* framework to the proposed expert testimony by considering whether that testimony is reliable and relevant to an issue in the case").

Only after determining that the trial court actually conducted a *Daubert* analysis does the Seventh Circuit proceed to determine "whether the district court abused its discretion in either the conclusion it reached to exclude [or admit] the expert testimony or the choice of factors it used to reach that conclusion." *Smith*, 215 F.3d at 719. See also *Ancho*, 157 F.3d at 515 ("Provided the district court adhered to *Daubert*'s parameters, we will not disturb the district court's findings unless they are manifestly erroneous.") (internal quotation marks omitted). The Seventh Circuit's approach is tantamount to that employed in the Tenth and Eleventh Circuits, because the court of appeals could not conclude, as a threshold matter, that the *Daubert* framework was properly applied if the trial court did not explain its reasoning.

C. Requiring District Courts To Provide A Reasoned Explanation For Admissibility Decisions Is Inherent In The *Daubert* Framework And Necessary To Ensure Proper Gatekeeping And Appellate Review

The Tenth Circuit's requirement that trial courts state their reasons for admitting or excluding expert testimony is clearly correct. Not only is such a requirement strongly suggested (if not required, see *Velarde*, 214 F.3d at 1209) by this Court's rulings in *Daubert*, *Kumho*, and *Joiner*, but it is necessary to ensure the proper performance of the gatekeeping function as well as appellate review. As the Tenth Circuit has observed, without an express explanation of the trial court's rationale, "it is impossible to determine on appeal whether the district court carefully and meticulously reviewed the proffered scientific evidence or simply made an off-the-cuff decision to admit the expert testimony." *Goebel*, 215 F.3d at 1088.

1. Under FRE 702, *Daubert* and *Kumho*, a trial court's decision whether to admit or exclude expert testimony encompasses a number of components. The court may be called upon to decide not only whether an expert is qualified, but also whether the expert's testimony is based on a reliable

methodology as well as relevant to the case at hand. Each of these decisions — qualification, reliability, and relevance (or "fit") — may in turn require certain threshold factual findings as well as a sophisticated analysis of all relevant considerations.

The inquiry into methodological reliability is especially complex and demanding. To conduct that inquiry properly, a trial court must first identify or distill the expert's methodology (which may involve choosing between competing versions of the methodology offered by the parties). In so doing, the court may be called upon to make factual findings concerning how the expert actually conducted the underlying evaluation, what sources of data were relied upon, and what reasoning was used in forming conclusions. In addition, a court may need to decide which of the *Daubert* reliability factors are pertinent, what other indicia of reliability or unreliability are present, whether the pertinent *Daubert* or other factors are satisfied, and how much weight should be given to each factor. And, of course, the court may be asked along the way to make purely legal rulings (such as the legally flawed ruling by the Eleventh Circuit in *Kumho* that *Daubert* was inapplicable to certain kinds of expert witnesses). All of the trial court's discretionary determinations, factual findings, and legal conclusions affect the ultimate decision whether the testimony is sufficiently reliable under FRE 702 to be presented to the jury.

Although the trial court's ultimate balancing of the *Daubert* factors is entitled to deference on appeal, certain decisions embedded within the court's analysis may be subject to a more stringent level of review. As one court has remarked in the *Daubert* setting, "[a]n abuse of discretion arises when the District Court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *In re TMI Litigation*, 193 F.3d 613, 666 (3d Cir. 1999), cert. denied, 120 S. Ct. 2238 (2000) (internal quotation marks omitted). As this characterization suggests, although review of the court's admissibility determination is generally deferential, legal errors affecting the court's analysis —

including errors in construing *Daubert* itself — are subject to *de novo* review. See *Goebel*, 215 F.3d at 1087 (explaining that the court "review[s] de novo the question of whether the district court applied the proper legal test" in admitting expert testimony).

This Court has made the same point in other contexts. For example, in *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990), the Court ruled that a trial court's decision to impose sanctions under Rule 11 should be reviewed deferentially. The Court reasoned that the trial court, "[f]amiliar with the issues and litigants, * * * is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated" by the Rule. *Id.* at 402. The Court emphasized, however, that "this standard would not preclude the appellate court's correction of a district court's legal errors" — for example, "determining that Rule 11 sanctions could be imposed upon the signing attorney's law firm." *Ibid.* If the lower court made such errors, "[a]n appellate court would be justified in concluding that the district court * * * abused its discretion." *Ibid.* See also *Koon*, 518 U.S. at 100 ("A district court by definition abuses its discretion when it makes an error of law.").

Given the potentially complex, hybrid nature of the inquiry into reliability under *Daubert*, it is critically important that trial courts explain their reasons for admitting or excluding expert testimony. If a trial court does not explicate its analysis under *Daubert*, but merely announces its bare conclusion, it would be impossible for an appellate court to determine whether that conclusion is an abuse of discretion. Indeed, the trial court's silence may well mask a fundamental error of law that would indicate a clear abuse of discretion. On the other hand, the decision may rest heavily on a "clearly erroneous" finding of fact. Or the court may have failed to make a reasoned decision at all — a failing that, in another setting, this Court has deemed

an abuse of discretion *per se*. See *Foman* v. *Davis*, 371 U.S. 178 (1962).[7]

This case provides a telling example of the problems that may arise when trial courts are permitted to leave their rulings unexplained. For all we know, the district court erroneously believed that this Court's decision in *Daubert* was completely irrelevant to Richardson's expert testimony because Richardson was not relying on a novel, "scientific" technique. Indeed, plaintiffs made that very argument in opposition to Ford's motion, relying on Sixth Circuit case law that the panel acknowledged was subsequently overruled by *Kumho*. App., *infra*, 6a n.3. If the district court's decision were based on that legal error, it unquestionably would constitute an abuse of discretion. But since the Sixth Circuit had no idea as to the district court's rationale, it was unable to look behind the ruling to identify the legal error. The fact that the majority indicated that it was going to "defer" to the district court's unexplained ruling merely compounded the risk of error.[8]

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[7] In many other contexts, courts of appeals have recognized that, "[a]bsent some indication of how the district court's discretion was exercised, [the reviewing] court has no way of knowing whether that discretion was abused." *Chalmers* v. *City of Los Angeles*, 796 F.2d 1205, 1213 (9th Cir. 1986). See also, *e.g.*, *Becker* v. *Archo Chem. Co.*, 207 F.3d 176, 180 (3d Cir. 2000) ("[w]here * * * the district court fails to explain its grounds for denying a Rule 403 objection and its reasons for doing so are not otherwise apparent from the record, there is no way to review its discretion").

[8] Had the trial court disclosed its belief that the *Daubert* factors were inapplicable to Richardson's testimony, the court of appeals surely would not have deferred to the decision to admit the testimony. Instead, it would have been forced, if not automatically to reverse, then to conduct a *de novo* review of the admissibility determination itself. Indeed, many appellate courts faced with the lower court's express disavowal of *Daubert* have taken this approach. See, *e.g.*, *Kinser* v. *Gehl Co.*, 184 F.3d 1259 (10th Cir. 1999), cert. denied, 120 S. Ct. 985 (2000); *Westberry* v. *Gislaved Gummi AB*, 178 F.3d 257,

Nor is this the only potential legal error lurking in the district court's unexplained rulings. For example, the district court might have allowed Richardson to testify because it agreed with his conclusions, thus violating this Court's direction that the "focus" of the trial judge's reliability inquiry "must be solely on the principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. Or the district court might have concluded that it was irrelevant whether Richardson's engineering and accident reconstruction techniques were "generally accepted" by others in those fields or whether Richardson was "employ[ing] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152. The district court might even have concluded that testing (or publication and peer review) is completely irrelevant to the work of an automotive engineer, notwithstanding plaintiffs' concession that "there are engineering or automobile journals that may have published articles on Bronco II rollovers." Plaintiffs' Response to Defendant's Motion In Limine, at 4.[9]

2. In addition to making meaningful appellate review possible, requiring trial courts to explain their admissibility rulings would result in more careful decisions whether to admit expert testimony. As Justice Breyer noted in his concurring opinion in *Joiner*, trial courts, in fulfilling their gatekeeping function, are sometimes asked "to make subtle and sophisticated

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262 (4th Cir. 1999); *Tanner* v. *Westbrook*, 174 F.3d 542 (5th Cir. 1999); *United States* v. *Iron Cloud*, 171 F.3d 587 (8th Cir. 1999); *United States* v. *Dorsey*, 45 F.3d 809 (4th Cir. 1995). Here, though, because the district court said *nothing*, its decision was presumed to have been properly reached, and hence entitled to deference.

[9] Of course, the potential for legal error is not limited to cases where the trial court *admits* expert testimony. For example, in excluding expert testimony as unreliable, a court might rely on the legally erroneous premise that satisfaction of each *Daubert* factor is mandatory or that the *Daubert* factors are exclusive.

determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer." 522 U.S. at 147. These determinations may be difficult because "judges are not scientists and do not have the scientific training that can facilitate the making of such decisions." *Id.* at 148. Although the evaluation of expert testimony may be challenging for courts not trained in scientific methods, "neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the 'gatekeeper' duties that the Federal Rules impose." *Ibid.* Indeed, "when law and science intersect, those duties must be exercised with *special care*." *Ibid.* (emphasis added).

If trial courts were obliged to articulate their reasons for admitting or excluding expert testimony, it would encourage them to perform the often burdensome task of analyzing the testimony under *Daubert* diligently and consistently. In light of the difficulty of making the *Daubert* inquiry in many circumstances, trial courts may well have a natural inclination to avoid hard decisions and instead simply to allow questionable evidence to be assessed by the jury. The Sixth Circuit's approach encourages courts to give in to this inclination. Requiring the trial court to state its rationale thus would help to ensure the proper functioning of the *Daubert* framework at trial as well as on appeal.

3. Given the substantial benefits flowing from the requirement that trial courts state their reasons for admitting or excluding expert testimony, it should come as no surprise that academic commentators have endorsed the position adopted by the Seventh, Tenth, and Eleventh Circuits but rejected by the court below. According to a leading treatise, "[a] trial court should put on the record both its conclusion concerning the application of *Daubert* and the reasoning behind that conclusion." 29 C. WRIGHT & V. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6266, at 23 (2000 Supp.). Moreover, "[t]he need to put the court's reasoning on the record" is especially "apparent in light of * * * *Kumho Tire*," which held that "the

factors applicable to determining the reliability of a given expert's testimony will vary depending on the area of his expertise, the nature of the issue, and the subject of his testimony." *Id.* at 28 n.90.2. Given this potential for variation, "[u]nless the trial court puts on the record the factors it believes are pertinent in a given case, a reviewing court will have difficulty determining what those factors were." *Ibid.*

II. IN CONFLICT WITH *DAUBERT* AND *KUMHO*, THE SIXTH CIRCUIT HELD THAT A TRIAL COURT MAY DISREGARD A RELEVANT *DAUBERT* FACTOR ON THE GROUND THAT THE FACTOR CAN ALWAYS BE CONSIDERED BY THE JURY

The Sixth Circuit's error went beyond failing to insist that the trial court explain its ruling. The court of appeals proceeded to speculate about how the trial court *might* have conducted a *Daubert* inquiry and, in so doing, endorsed a method of analysis that is plainly at odds with this Court's teachings. Specifically, the Sixth Circuit brushed aside Ford's unrebutted showing that Richardson's theories had never been tested, reasoning that

> [t]he district court, in its discretion, could have decided that Richardson's failure to test his theories went to the *weight* of his testimony regarding defects in the Bronco II, *not to its admissibility.*

App., *infra,* 8a (emphasis added). The Sixth Circuit stressed, in this connection, that "Ford was able to challenge the testimony regarding the alleged defects in the Bronco II through cross examination." *Ibid.* This analysis is seriously mistaken, inconsistent with this Court's decisions, and deserving of further review.

A. In *Kumho*, this Court instructed that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." 526 U.S. at 152. At the same time, the Court made clear that a "trial court *should consider* the specific factors identified in *Daubert* where they are reasonable

measures of the reliability of the testimony." *Ibid.* (emphasis added). Three Members of the Court took pains to emphasize that the trial court's "discretion in choosing the manner of testing expert reliability" is "not discretion to abandon the gatekeeping function" or to "perform the function inadequately." *Id.* at 158-59 (Scalia, J., concurring). Thus, the "failure to apply one or another of [the *Daubert* factors] may be unreasonable, and hence an abuse of discretion." *Id.* at 159. Put another way, "*Kumho Tire*'s emphasis on the word 'may' should not be misunderstood to grant open season on the admission of expert testimony by permitting courts discretionarily to disavow the *Daubert* factors." *Black* v. *Food Lion, Inc.*, 171 F.3d 308, 311 (5th Cir. 1999).

The Sixth Circuit did not dispute (nor could it) that Richardson's theories were untested or that the *Daubert* testing factor was a "reasonable measure" of reliability in this case. The court of appeals' suggestion that the district court nonetheless could elect, in its discretion, to disregard this highly relevant and applicable *Daubert* factor when determining admissibility — on the ground that the *jury* would remain free to consider it — is completely contrary to this Court's instruction that trial courts "should consider" the *Daubert* factors where, as here, they are a reasonable measure of reliability.

The Sixth Circuit's reasoning is all the more troubling because it has the potential to apply in every case involving the admission of disputed expert testimony. *All* of the *Daubert* factors could be used in cross-examining an expert witness or by the jury in weighing the expert's testimony. The same is true for other indicia of reliability. For that reason, the Sixth Circuit's rationale would excuse the trial courts from adhering to *Daubert* at all.

B. The Sixth Circuit's analysis is especially problematic in this case, because testing is a critical component of the process of product design. As Judge Ryan pointed out in dissent, "actual testing is the principal method employed by the engineering

community to prove or disprove an engineering hypothesis." App., *infra*, 24a.[10] The majority's suggestion that the lack of testing, though pertinent to reliability, could be disregarded by a gatekeeper would also allow a trial court to avoid its obligation "to make certain that an expert * * * employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152. Not surprisingly, other courts have found that the failure to test alternative designs renders unreliable, and hence inadmissible, testimony by an engineering expert that a particular design is defective. See, *e.g.*, *Bourelle* v. *Crown Equip. Corp.*, 220 F.3d 532, 538 (7th Cir. 2000). The Sixth Circuit's analysis is at odds with these decisions.

III. THE ISSUES PRESENTED ARE SIGNIFICANT AND RECURRING

There can be little doubt that the issues raised in this petition arise with great regularity and are critically important to the proper administration of justice in the federal courts. Since this Court made clear in *Kumho* that the trial court's gatekeeping obligations extend to "*all* expert testimony" (526 U.S. at 147), "*Daubert* has become ubiquitous in federal trial courts." *United States* v. *Alatorre*, 2000 U.S. App. LEXIS

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[10] Even before *Kumho*, the lower courts routinely considered whether engineering experts had "tested" their alternative designs in product liability cases. See, *e.g.*, *Cummins* v. *Lyle Indus.*, 93 F.3d 362, 368-70 (7th Cir. 1996); *Pestel* v. *Vermeer Mfg. Co.*, 64 F.3d 382, 384 (8th Cir. 1995); *Stanczyk* v. *Black & Decker, Inc.*, 836 F. Supp. 565, 566 (N.D. Ill. 1993) (excluding testimony of expert whose redesign of allegedly defectively designed saw would not have permitted saw to perform its intended function). Use of the "testing" factor reflects a recognition that engineers themselves routinely test their designs to see if they work without impairing the utility of the product. See, *e.g.*, *Cummins*, 93 F.3d at 369 (citing expert witness's admission that "testing is a necessary part of the design process"); *Stancyzk*, 836 F. Supp. at 567 (noting that "the history of engineering and science is filled with finely conceived ideas that are unworkable in practice").

20177 (9th Cir. Aug. 16, 2000). Virtually every complex federal case involves the presentation of expert testimony, as do many simpler lawsuits. In many such cases, the expert testimony is challenged under *Daubert*. Statistical evidence confirms that issues related to the admission of expert testimony arise with great frequency.[11] And in many, if not most, of these cases — as in this case — the proffered expert testimony is critical, if not outcome-determinative. See, *e.g.*, *Weisgram* v. *Marley*, 120 S. Ct. 1011 (2000).

The issues presented are also of enormous practical importance. The requirement that trial courts state reasons for their admissibility determinations is indispensable to ensuring that the courts diligently fulfill their "gatekeeper" obligations under *Daubert* and *Kumho* and that the courts of appeals can review their decisions properly. Moreover, as the Chief Justice observed in *Daubert*, the standards governing the admissibility of expert testimony in federal trials plainly are "important area[s] of the law." *Daubert*, 509 U.S. at 601 (Rehnquist, C.J., joined by Stevens, J., concurring in part and dissenting in part); see also *Development in the Law: Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1485 (1995) (taking note of the "enormous increase in the use of scientific evidence" in federal litigation"). This case — in which a $10.5 million judgment rested on the unexplained, but erroneous, admission of expert testimony — is an appropriate vehicle for exploring these important issues.

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[11] A search of Westlaw's ALLFEDS database indicates that, in 1999 alone, *Daubert* was cited some 330 times by federal courts. In the 18 months since it was decided, *Kumho* has been cited some 366 times. These figures, of course, reflect only the published decisions.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOLORES CLAY, as Administratrix of the Estate of KATHLEEN P. CLAY; JOHN D. STROM, as Administrator of the Estate of Christopher J. Strom,	)	No. 98-4230
Plaintiffs-Appellees,	)	
v.	)	
FORD MOTOR COMPANY, a Delaware Corporation,	)	
Defendant-Appellant,	)	
WILLIAM R. SLONSKY,	)	
Third Party Defendant-Appellee.	)	

Appeal from the United States District Court
for the Northern District of Ohio at Akron
Nos. 96-02127; 96-02128 — David D. Dowd, Jr.,
District Judge.

Argued: September 17, 1999

Decided and Filed: June 28, 2000

Before: RYAN, MOORE, and GIBSON,[1] Circuit Judges.

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[1] The Honorable John R. Gibson, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

GIBSON, J., delivered the opinion of the court, in which MOORE, J., joined. RYAN, J., delivered a separate dissenting opinion.

OPINION

JOHN R. GIBSON, Circuit Judge. Ford Motor Company appeals from a judgment on a jury verdict that the Ford Bronco II has a design defect that proximately caused the deaths of Kathleen Clay and Christopher Strom and injury to William Slonsky. Ford argues that the district court erred by denying its motions for judgment as a matter of law and a new trial. Ford also argues that the admission of the testimony of Dr. Melvin Richardson, the appellees'[1] expert witness, was error, as was the grant of prejudgment interest to the Clay and Strom estates. We affirm.

Slonsky was driving a 1988 two-wheel drive Bronco II north on Interstate 77 in Ohio on a Sunday night. In the front passenger seat was Sean Lance, the vehicle's owner,[2] and in the back seat were Clay and Strom. The four friends were headed to a club in Cleveland. Slonsky was apparently the designated

[1] The estates of Clay and Strom brought this action. Slonsky became a party by filing a counterclaim in response to Ford's impleader. Slonsky joined with the estates in presenting evidence at trial, and Ford appeals from the entry of judgment on the jury verdict in favor of each of the three parties. We will refer to the two estates and Slonsky collectively as "appellees."

[2] The Bronco II was actually purchased by Lance's mother, Lenora Buckland, for Lance to use.

driver; Lance had taken LSD and asked him to drive. Slonsky had never driven the Bronco II before that night, although he did drive it to a gas station to get cigarettes prior to leaving for the club.

Slonsky was driving 53 to 65 miles per hour in the middle lane of three lanes when he noticed a fast-moving car behind him. To avoid the faster car, he moved into the right lane. Once there, he observed that the car in front of him was slowing down, so he returned to the center lane. At that point, he felt the vehicle "jerk" or "overcorrect" to the left, and he responded by turning the steering wheel back to the right. At some point while trying to regain control of the vehicle, he may have turned the steering wheel as much as a full revolution.

The vehicle turned sideways, its passenger-side wheel rims leaving gouge marks in the pavement for approximately fifteen feet. It rolled two and three-quarters or three and three-quarters times, coming to rest on the driver's side about 235 feet from the end of the gouges. Clay and Strom, who were not wearing seatbelts, were ejected during the rollover; Clay died at the scene and Strom died at the hospital soon after. Slonsky and Lance, who had been wearing seatbelts, were able to climb out the passenger-side window. At the hospital, Slonsky tested negative for drugs and alcohol.

Dolores Clay and John Strom sued Ford on behalf of their children's estates in this diversity product liability action. Ford asserted third-party claims for indemnity and contribution against Slonsky, who then brought a counterclaim against Ford. After an extensive trial on liability, the jury found that the Bronco II has a design defect and that the defect proximately caused the deaths of Clay and Strom and the injuries to Slonsky. The jury rejected Ford's affirmative defenses of superseding cause and, as to Slonsky, assumption of the risk. After the damages phase of the trial, the jury awarded compensatory damages totaling $17.5 million, but found that the appellees were not entitled to punitive damages. Dolores Clay, John Strom, and Slonsky consented to remittiturs totaling $7 million

after the district court ruled on the post-trial motions and awarded prejudgment interest to the Clay and Strom estates.

Ford asserts that the appellees failed to present substantial evidence that the Bronco II has a design defect that caused this particular accident and that the verdict was against the weight of the evidence. Ford also argues that the district court erred by admitting Richardson's testimony and by awarding prejudgment interest.

I.

We first consider Ford's argument that the district court should have excluded Richardson's testimony. We review a district court's decision to admit or exclude expert testimony for abuse of discretion, *see General Elec. Co. v. Joiner,* 522 U.S. 136, 138-139 (1997), finding it only if we are firmly convinced that the district court erred, *see Greenwell v. Boatwright,* 184 F.3d 492, 495 (6th Cir. 1999). Deference to the district court's decisions "is the hallmark of abuse of discretion review." *Joiner,* 522 U.S. at 143. This is a close case, but after careful review of the record, we are not firmly convinced that the court abused its discretion by allowing Richardson to testify.

Prior to trial, Ford submitted a motion in limine to exclude or limit Richardson's testimony, alleging that his opinions did not meet the requirements for expert testimony. Ford requested a hearing on its motion. Finding that Ford's motion was predicated on a ruling made almost three months earlier by a district court in West Virginia and that Ford had shown no good cause for waiting to file the motion until one week before the start of trial, the court denied its request for a hearing. Having been alerted to Ford's objections, the court indicated that it might conduct its own voir dire of Richardson before he testified.

District court judges must determine whether an expert's testimony is both relevant and reliable when ruling on its admission. *See United States v. Jones,* 107 F.3d 1147, 1156, (6th Cir. 1997). In *Kumho Tire Co. v. Carmichael,* 526 U.S. 137

(1999), the Supreme Court confirmed what we held in *Jones*: the general gatekeeping obligation set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), applies when considering all expert testimony, including testimony based on technical and other specialized knowledge. *See Kumho Tire*, 526 U.S. at 141. It further held that the specific *Daubert* factors — testing, peer review and publication, potential rate of error, and general acceptance in the relevant community — may be considered by the district court even when the proffered expert testimony is not scientific.[3] *See id.* Whether these specific factors are "reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id.* at 153.

Although the district court did not explicitly recite that Richardson's testimony was relevant and reliable, its rulings indicate that it made that determination. Ford's motion in limine squarely raised the issue of reliability. Ford made a variety of objections throughout Richardson's testimony, including a continuing objection to his ability to offer opinions with respect to accident reconstruction, and at the conclusion of the appellees' case, Ford moved to strike Richardson's testimony in its entirety. We conclude, based on the district court's rulings on the motions and objections, that the court determined Richardson's testimony was relevant and reliable.

The district court is not obligated to hold a *Daubert* hearing, and in the absence of a hearing, "we must review the record to determine whether the district court erred in its assessment of the relevance and reliability of the expert testimony." *Greenwell*, 184 F.3d at 498. Having undertaken that review, we agree that Richardson's testimony was relevant

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[3] This overruled our previous holding that the specific *Daubert* factors did not apply to non-scientific expert testimony. *See Jones*, 107 F.3d at 1158.

to the issues in this case. He testified regarding the alleged defects in the Bronco II, and he reconstructed the accident. Ford's sole challenge to Richardson's testimony is that it was not reliable. Our inquiry focuses on the methodology and principles used by Richardson, not on his conclusions. *See Daubert,* 509 U.S. at 595.

The court qualified Richardson as an expert in the fields of mechanical engineering, machine design, vehicle dynamics, and accident reconstruction.[4] Richardson has an undergraduate degree in mechanical engineering, masters degrees in both mechanical engineering (with an emphasis in machine design) and applied mathematics, and a doctoral degree in engineering mechanics. He taught at Clemson University for twenty years in the fields of mechanical engineering, machine design, dynamics, engineering mechanics, and stress analysis.

Richardson testified that a quarter or a third of the full-time consulting work he has done since 1985 has been in accident reconstruction, with the majority being reconstruction of automobile accidents. He spends the remainder of his consulting time generally in the field of machine design, looking at the process by which a machine is designed and determining whether the machine is suitable and safe for certain

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[4] After the appellees moved to qualify Richardson as an expert in these fields, the court called counsel to the bench and recognized that it had overruled Ford's earlier motion to exclude the testimony. When offered the opportunity to conduct voir dire at this point, Ford's attorney stated that he would prefer to question Richardson when a specific topic was reached, otherwise it would seem disjointed. The court again offered Ford the opportunity to question Richardson generally about those areas of expertise, but noted that questions on specific opinions would be best reserved for cross-examination. Ford's attorney stated that he did not disagree and that Ford would also make objections as to foundation at appropriate times.

purposes. On a couple of occasions, Ford has retained Richardson to consult and provide opinions.

Richardson testified that dynamics, or the analysis of the forces that produce motion in objects, can be used to analyze vehicles and parts of machines and that accident reconstruction is simply an application of dynamics. To reconstruct accidents, Richardson looks at the physical and factual information available, applies standard engineering principles to this information, and determines the most probable sequence of events.

Richardson has never worked in the automobile manufacturing industry, nor has he tested a two-wheel drive Bronco II. He has never published an article on vehicle handling and stability, although he has made presentations on those topics.

Richardson's testimony focused on three alleged defects in the Bronco II. First, he criticized the vehicle's "stability index" as too low. The stability index is calculated by dividing the track width, measured from the center of one tire to the center of the tire across from it, by the height of the center of gravity of a vehicle. Second, he testified that a rear stabilizer bar on the Bronco II would cause oversteer, which is characterized by spinning out, or a sliding of the rear of the vehicle, on a turn. Finally, he theorized that the front suspension used on the Bronco II, the Twin I-beam, causes "jacking." According to Richardson, in a hard turn, this suspension will cause the front end of the vehicle to rise and the track width to decrease, making the vehicle taller and narrower and elevating the center of gravity.

Richardson also reconstructed the accident, describing how photographs of the vehicle and the road related to his analysis and referring to a scale drawing of the highway where the accident occurred. He said that Slonsky's statement that the vehicle "overcompensated" during the double lane change was consistent with the Bronco II's tendency to oversteer.

Richardson stated that the rollover resulted from the inadequate stability of the Bronco II. He expressed the opinion that these handling and stability defects caused the Bronco II to roll over in this case, and that there were no other causes of the accident.

Ford characterizes Richardson's approach to accident reconstruction as "cavalier," stating that his investigation consisted only of reviewing the police accident report and "some" depositions, statements, and photographs and of visiting the accident site the day before he testified. Ford's expert on accident reconstruction also reviewed the police report, depositions, statements, and photographs. In addition, he inspected the actual vehicle and visited the accident site several months before the trial.

Ford does not indicate how Richardson's failure to inspect the Bronco II or his late visit to the accident site undermine his methodology of accident reconstruction or render his testimony about this particular accident inadmissible. The district court allowed a continuing objection by Ford to Richardson's testimony concerning accident reconstruction and ultimately rejected Ford's motion to strike.

Ford also focuses on Richardson's failure to test his theories that the Bronco II oversteers and "jacks," but does not challenge the principle that dynamics can be used to analyze vehicle designs and predict their motion. The district court, in its discretion, could have decided that Richardson's failure to test his theories went to the weight of his testimony regarding defects in the Bronco II, not to its admissibility. As with Richardson's accident reconstruction testimony, Ford was able to challenge the testimony regarding the alleged defects in the Bronco II on cross-examination. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert,* 509 U.S. at 596.

In accord with the teaching of *Greenwell,* we reviewed the record in detail to determine whether the district court erred in its assessment of reliability. We observe that Ford had a full opportunity to cross-examine Richardson, and that the court was careful to preserve and rule on Ford's objections. Because we are not firmly convinced that the district court erred, we find no abuse of discretion.

II.

In a diversity action, we apply the standard of review of the state whose substantive law governs when reviewing a denial of a motion for judgment as a matter of law that is based on the sufficiency of the evidence. *See Morales v. American Honda Motor Co.*, 151 F.3d 500, 506 (6th Cir. 1998). The district court applied the following standard:

> The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon [a motion for judgment as a matter of law].

Posin v. A.B.C. Motor Court Hotel, Inc, 344 N.E.2d 334, 338 (Ohio 1976). The Ohio Supreme Court has since stated that "the reasonable minds test . . . calls upon the court only to determine whether there exists any evidence of substantial probative value in support of the claims of the party against whom the motion is directed." *Texler v. D. O. Summers Cleaners & Shirt Laundry Co.,* 693 N.E.2d 271, 273 (Ohio 1998) (citations and internal quotations omitted).

Under Ohio law, a manufacturer is liable for a design defect if the plaintiff proves by a preponderance of the evidence both that the product was defective in design and that the defect was

a proximate cause of the harm for which the plaintiff seeks damages. *See* Ohio Rev. Code Ann. § 2307.73(A) (Anderson 1998). A product is defective in design if (1) the foreseeable risks of the design exceed the benefits, or (2) the product is more dangerous than an ordinary consumer would expect when used in a reasonably foreseeable way.[5] *See* Ohio Rev. Code Ann. § 2307.75(A) (Anderson 1995).

A.

Under the risk-benefit test, the foreseeable risks of a design are determined by considering the following non-comprehensive list of factors: the nature and magnitude of the risks in light of the intended and reasonably foreseeable uses of the product; the likely awareness of the product's users of those risks; the likelihood that the design would cause harm in light of its intended and reasonably foreseeable uses; and the extent to which the product conformed to any applicable product standards that were in effect when it left its manufacturer. See Ohio Rev. Code Ann. § 2307.75(B).

Ford argues that evidence regarding the Bronco II's production and development is irrelevant because the product, not the manufacturer's conduct, is the focus of a design defect claim. The Ohio statute, however, makes the foreseeable risks of the design of that product relevant. The handling and stability problems that the Bronco II had during production and development are relevant to the foreseeable risk factors, including the nature and magnitude of the risks in light of the vehicle's intended uses and the likelihood that its design would cause harm.

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[5] The current Ohio statute, which applies to products designed on or after January 27, 1997, omits the consumer-expectations test. *See* Ohio Rev. Code Ann. § 2307.75(A) (Anderson 1998).

James McClure, a Ford engineer, testified that during production of the Bronco II, Ford ceased real life J-turn testing in favor of computer simulations. A J-turn maneuver tests a vehicle at its limit by driving it straight at a given speed and then turning the steering wheel to a certain position and holding it in that position. Ford used 360 and 540 degree steering wheel inputs when conducting J-turn tests. During one such maneuver, a Bronco II went up on two wheels and flipped after its outrigger, a safety device used when testing vehicles, failed. Because of a concern for the safety of its test drivers, Ford switched to computer simulations.

McClure further testified that the Bronco IIs sold to the public had a revised stabilizer bar design that improved their handling and stability and that this design was not present in the vehicles tested earlier. Ford never did actual J-turn tests on the Bronco IIs that had the revised stabilizer bar design. Construing this evidence most strongly in favor of the appellees, reasonable minds could conclude that the Bronco II's design still posed a foreseeable risk of flipping during a J-turn.

Ford also argues that evidence presented regarding the Bronco II's stability index does not prove a design defect. At trial, Ford presented statistical evidence showing that vehicles with similar stability indexes have different rollover rates, and vehicles with different stability indexes have similar rollover rates. Fred Parrill, a Ford engineer, testified that there is no direct correlation between the static stability index and a vehicle's dynamic performance. McClure testified that stability index has little effect on overall vehicle performance.

Ford's challenge to the validity of stability index as a predictor of vehicle behavior is countered by a 1981 Ford program report in which its engineers recommend ways to increase the stability index of the Bronco II. In addition, Parrill testified that a higher stability index meant that a vehicle would have less propensity to roll. This is substantial evidence upon which reasonable minds could come to different conclusions,

including that a relatively low stability index indicated a foreseeable risk of rollover.

Under the risk-benefit test, the benefits of a design are determined by considering the following non-comprehensive list of factors: the product's utility, including performance or safety advantages; the technical and economic feasibility of using an alternative design; and the nature and magnitude of any foreseeable risks associated with an alternative design. *See* Ohio Rev. Code Ann. § 2307.75(C).

To show the benefits of the design of the Bronco II, Ford put on evidence of its utility. According to the Ford engineer who supervised vehicle dynamics at the time the two-wheel drive Bronco II was approved for production, a sport utility vehicle has several distinctive characteristics: first, the occupants sit relatively high for good visibility; second, the vehicle is maneuverable in tight spaces; third, it has cargo carrying capability; and finally, it has sufficient ground clearance to use on all road conditions, including off road.

The appellees presented evidence regarding the feasibility of alternative designs by pointing out options that Ford had considered and rejected during the development of the Bronco II. Ford considered three front suspensions for the vehicle: the Twin I-beam, the MacPherson strut, and the short-long arm. Ford chose the Twin I-beam, which caused the engine to be located higher in the vehicle than if either of the other suspensions had been chosen. Because the engine is one of the heaviest parts of the vehicle, the use of the Twin I-beam suspension worsened the stability index of the Bronco II.

The 1981 Ford program report regarding the stability index of the Bronco II listed five alternatives to increase the index. Three of the proposals that Ford did not choose provided for a wider track and a higher stability index than the proposal chosen. The increased track width was a problem because it would have required a sheet metal design change with a minimum one-year delay in production, and because Ford

planned to sell the vehicle in Japan. If reasonable minds could conclude that stability index is relevant to rollover propensity, they could also conclude that these alternative designs would pose less risk than the design Ford adopted.

Before Ford ceased J-turn testing, its engineers concluded that an improvement in the Bronco II's J-turn handling could be achieved by reducing its wheel size by one inch or increasing its track width by three to four inches. Although these suggestions were technically feasible, they were not implemented. Reasonable minds could reach different conclusions on whether the foreseeable risks of the Bronco II's design outweighed its benefits.

B.

Even if the jury did not conclude that the Bronco II had a design defect under the risk-benefit analysis, it could have found a design defect if the vehicle was more dangerous than an ordinary consumer would expect when used in a reasonably foreseeable manner. The "B Roll" videotape, introduced by the appellees, shows the Bronco II lift both right wheels off the ground during an avoidance maneuver done at 37 miles per hour. Ford argues that the tape shows the driver rapidly turning the steering wheel "in a radical maneuver that few people would have the courage to attempt." This is evidence upon which reasonable minds could come to different conclusions, including that the vehicle was being used in a reasonably foreseeable way and that the resulting two-wheel lift was more dangerous than an ordinary consumer would expect.

When determining whether a product is more dangerous than an ordinary consumer would expect, "evidence of unsafe, unexpected product performance is sufficient to infer the existence of a product defect." *State Farm Fire & Cas. Co. v. Chrysler Corp.*, 523 N.E.2d 489, 495 (Ohio 1988). On the night of the accident, Slonsky made what seemed to be a typical lane change maneuver. He testified that he felt the Bronco II overcorrect, he could not regain control of the vehicle, and it

started to roll. There is no evidence that Slonsky was speeding or driving erratically. The driver of a vehicle that was behind the Bronco II on the highway confirmed the lane changes Slonsky made and testified that Slonsky was driving at a normal rate of speed prior to the accident. This rollover — an unsafe, unexpected event — is evidence that supports a finding that the Bronco II has a design defect under the consumer-expectations test. A lane change on a highway while traveling at a normal rate of speed is a reasonably foreseeable use of the product, and reasonable minds could find the resulting accident more dangerous than an ordinary consumer would expect.

C.

Ford argues that even if the Bronco II has a design defect, the appellees did not prove that it was the cause of this accident. "[L]iability for a design defect is not proven absent proof of causation relating some aspect of the challenged design to the injury." *State Farm,*, 523 N.E.2d at 496. In *State Farm,* a couple's automobile caught fire while it was parked in their garage and they sued its manufacturer, alleging that a design defect caused the fire. *See id.* at 490-491. The court upheld a directed verdict for the manufacturer on this claim because there was no proof of causation:

> While proceeding to exclude possible causes of the fire other than design defects, plaintiffs presented no expert analysis or other evidence demonstrating that some aspect of the design of the Chrysler K-car would or could result in electrification or overheating of components and/or wiring sufficient to cause an auto fire when the ignition was turned off.

Id. at 495. In contrast, the appellees presented evidence that certain aspects of the Bronco II's design, including its narrow track width and high center of gravity, could result in wheel lift and rollover while the vehicle was in operation. In addition, Richardson testified that Slonsky's description of the Bronco II's behavior was consistent with the alleged oversteer

tendencies of the vehicle and that in his opinion, once the Bronco II was sideways, it rolled because of a stability defect. Reasonable minds considering this evidence could reach different conclusions on whether the alleged design defects caused the accident.

Construing the evidence most strongly in favor of the appellees, there was substantial competent evidence upon which reasonable minds could reach different conclusions, including that the Bronco II's design was defective under Ohio's statutory definition and that a defect caused the accident. Accordingly, we affirm the district court's denial of Ford's motion for judgment as a matter of law.

III.

We review a denial of a motion for a new trial for abuse of discretion, applying the federal standard rather than Ohio law. *See Anchor v. O'Toole*, 94 F.3d 1014, 1021 (6th Cir. 1996). In determining whether to grant a new trial when the claim is that the verdict is against the weight of the evidence, a district court must compare and weigh the opposing evidence and it must set aside the verdict if it determines that the verdict is against the clear weight of the evidence. *See J. C. Wyckoff & Assocs. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1487 (6th Cir. 1991). Typically, we will find abuse of discretion only if

> we have a definite and firm conviction that the trial court committed a clear error of judgment. And, in reviewing a trial court's denial of a new trial motion on the ground that the verdict is against the clear weight of the evidence, we accept the jury's verdict if it was reasonably reached.

Anchor, 94 F.3d at 1021 (citations and internal quotations omitted).

We have carefully reviewed the record and the district court's opinion and order. The district court considered the evidence that the parties presented at trial and concluded that it was possible to find that the scale tipped in the appellees' favor

and that the verdict was not against the clear weight of the evidence. Our discussion of whether Ford was entitled to judgment as a matter of law illustrates that the jury's verdict was reasonable. Because there is no indication that the court abused its discretion or erred in applying the standard for the grant of a new trial, we affirm its denial of Ford's new trial motion.

IV.

We review a district court's grant of prejudgment interest for abuse of discretion. *See Stallworth v. City of Cleveland,* 893 F.2d 830, 836 (6th Cir. 1990). Under Ohio law, an award of prejudgment interest must be made if the court finds "that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case." Ohio Rev. Code Ann. § 1343.03(C)(1) (Anderson 1993). The party requesting prejudgment interest has the burden of proving that it made a good faith effort to settle and that the other party failed to make a good faith effort to settle. *See Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 348 (Ohio 1994).

If a party has (1) fully cooperated during discovery, (2) rationally evaluated its risks and potential liability, (3) not attempted to unduly delay the proceedings, and (4) in good faith, made a settlement offer or responded to the other party's offer, that party has not failed to make a good faith effort to settle the case. *See Kalain v. Smith,* 495 N.E.2d 572, 574 (Ohio 1986). "If a party has a good faith, objectively reasonable belief that [it] has no liability, [it] need not make a monetary settlement offer." *Id.* Placing the burden of proof on the party seeking prejudgment interest creates difficulties for that party "since much of the information needed to make a case for prejudgment interest is in the possession of the party resisting an award." *Moskovitz,* 635 N.E.2d at 348.

To prove that they made a good faith offer to settle, the Clay and Strom estates presented the testimony of their attorney, Edgar Heiskell, who detailed their offers of settlement.[6] On August 24, 1996, Heiskell sent a package of materials to Ford regarding the claims and requested $1.2 million on behalf of each estate. He sent additional materials to complete the package four days later. On August 12, 1997, Heiskell faxed a message regarding settlement of his entire inventory of claims against Ford and requested $750,000 for each estate. On January 9, 1998, Heiskell sent a letter to Ford in another attempt at a "global settlement" and requested $550,000 for each estate. Finally, after the second day of trial, Heiskell requested $1.5 million for each estate.

The estates did not challenge Ford's cooperation during discovery or claim that Ford unnecessarily delayed the proceedings. They argued that Ford neither rationally evaluated its potential liability nor responded in good faith to their settlement offers.

On September 23, 1996, Ford sent what appeared to be a form letter to Heiskell, requesting some of the materials that it had received with the first settlement demand, along with additional materials that Heiskell had not initially provided. On July 23, 1997, Ed Stewart, a Ford attorney, sent a letter to Heiskell that discussed Ford's assessment of the merits of each of his cases and its refusal to pay exorbitant sums to settle cases with no merit. The letter did not specifically refer to the Clay and Strom matters. Stewart testified that he and Heiskell spoke on the telephone as often as weekly regarding the Bronco II cases. After Stewart requested a proposal to settle all of Heiskell's pending cases, Heiskell responded with the August

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[6] All three appellees sought prejudgment interest, and the district court denied Slonsky's motion. Slonsky did not file a cross-appeal on this issue.

1997 fax. Ford's first and only settlement offer in this case came after the jury had determined liability and prior to the damages portion of the trial when it offered $1.5 million to settle the three claims.

Heiskell testified that in late September 1996, Ford's general counsel told him that Ford was not going to settle any of his cases because it did not want to "incentivize" him. Ford has settled eleven of nineteen cases that Heiskell brought against it, some of them after this alleged statement was made.

The district court found that the Clay and Strom estates established that they attempted to settle the case in good faith and that Ford failed to act in good faith by refusing to make any settlement offers prior to trial. Our review of the evidence convinces us that the court did not abuse its discretion by making this finding, and once this finding was made, Ohio law mandated an award of prejudgment interest. *See* Ohio Rev. Code Ann. § 1343.03(C)(1).

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For the foregoing reasons, we affirm the judgment of the district court in its entirety.

DISSENT

RYAN, Circuit Judge, dissenting. Because I believe that the district court abused its discretion in admitting Dr. Richardson's testimony, I respectfully dissent.

The majority describes the admissibility of Dr. Richardson's testimony as a "close case." I disagree. In my view, this case presents a clear example of a court improperly abdicating its gatekeeping function under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

I.

Expert testimony is admissible under Fed. R. Evid. 702 only if the trial court finds that the testimony is both relevant and reliable. *Daubert,* 509 U.S. at 589, 594-95, 597. While *Daubert* focuses on "scientific" experts, the Supreme Court recently made clear that the *Daubert* principles apply to the opinions of "non-scientific" experts such as engineers. *Kumho,* 526 U.S. at 141. Here, there is no question that Dr. Richardson's testimony was relevant to the material issues presented in this product liability lawsuit. The critical question, then, is whether the testimony was reliable.

II.

The procedural history preceding the admission of Dr. Richardson's testimony provides the first unmistakable sign of trouble. As the majority acknowledges, the district court refused to hold a hearing on Ford's pretrial motion *in limine,* "reserv[ing] to itself the *possibility* of engaging in a brief voir dire of Dr. Richardson before his testimony is offered." (Emphasis added.) At trial, after Dr. Richardson summarized his training and experience, plaintiffs' counsel moved to qualify him as an expert in several engineering-related fields. Defense counsel declined the opportunity to conduct *voir dire* at that time because the questioning would appear disjointed from the jury's perspective. The court suggested that, given the breadth of Dr. Richardson's areas of expertise, defense counsel reserve his questioning of Dr. Richardson for cross-examination. The court then ruled that Dr. Richardson was qualified as an expert in several fields, with the understanding that the defense would make continuing foundational objections as the testimony proceeded. At the conclusion of the plaintiffs' case, Ford moved to strike Dr. Richardson's testimony pursuant to *Daubert.* The court overruled the motion without providing any reasoning on the record.

Although we have stated that a trial court need not hold an evidentiary hearing in every case to comply with *Daubert*, we have made it clear that the court must make an "*initial* assessment of the relevance and reliability of the expert testimony." *Greenwell v. Boatwright,* 184 F.3d 492, 498 (6th Cir. 1999) (emphasis added). Here, the district court did not make such an initial assessment, and indeed made no express assessment at any time as to the reliability of Dr. Richardson's testimony. The absence of such determination signals the trial court's failure to perform its gatekeeping function as mandated by *Daubert* and *Kumho.* In my view, this failure alone constitutes an abuse of discretion. The majority, however, is willing to overlook this failure, in essence substituting its own determination of reliability for that of the district court. Even if I agreed with the majority's approach, I cannot agree with the majority's assessment of reliability.

III.

Daubert sets forth a non-exclusive list of factors for trial courts to consider in determining the reliability of expert testimony: (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique's operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field. *Daubert,* 509 U.S. at 593-94. A trial court may consider one or more of these factors, but the Supreme Court has cautioned that this "list of specific factors neither necessarily nor exclusively applies to all experts or in every case" and that a trial court has "broad latitude" to determine whether these factors are "reasonable measures of reliability in a particular case." *Kumho,* 526 U.S. at 141, 153. Despite the broad flexibility afforded to trial courts, I do not read *Daubert* or *Kumho* to mean that the complete disregard of one or more of the *Daubert* factors in a given case can never be definitive.

In its application of *Daubert,* the majority first devotes significant attention to Dr. Richardson's general education and experience. There is no question that a witness's education, personal knowledge, and experience are important components of the witness's qualification to render an expert opinion, *viz*, whether he or she is an "expert." But in cases involving scientific opinion *(Daubert* cases) or applied scientific opinion as in matters of engineering *(Kumho* cases), it is the *methodology* employed by the expert, not the expert's general educational qualifications, that is in issue. Dr. Richardson's impressive academic and experiential history tells us nothing about how he did what he did to reach his conclusions in this case. And I do not read the majority's opinion to suggest otherwise.

To be sure, the majority opinion summarizes Dr. Richardson's testimony describing the methods he employed in reaching his conclusions. For example, before he opined on accident reconstruction, Dr. Richardson reviewed the process he employed to reach his conclusions. He personally reviewed several discovery depositions in the litigation, reviewed police reports, and prepared a scale drawing reflecting points identified in the police reports. He also visited the scene of the accident, but this visit occurred the day before the trial, well after he had formed his opinion. Finally, Dr. Richardson reviewed photographs of the vehicle following the accident. He admitted, however, that he did not personally inspect the vehicle, but rather sent his son to take the photographs. While this evidence indirectly suggests that *Dr. Richardson* thought his methodology was reliable, it hardly suffices as evidence of reliability under *Daubert. See id.* at 157. Nothing in this testimony touches on any of the *Daubert* factors, or any other measures of reliability, for that matter. The record is absolutely devoid of any indication that the process or methodology Dr. Richardson employed in reaching his accident reconstruction opinion was "good science" or "good engineering.

The majority minimizes this deficiency by noting that Ford's accident reconstruction expert, Dr. Carr, performed some of the same procedures in reaching *his* conclusion about how the accident occurred, which, of course, was very different than Dr. Richardson's conclusion. It is not clear to me how this observation is useful. Similarity in the methods employed by two groups of experts tells us nothing about the legal sufficiency (*i.e.*, the reliability) of either. Moreover, plaintiffs' counsel did not object to the admission of Dr. Carr's testimony. The majority also overlooks potentially key distinctions between the experts' methods. Unlike Dr. Richardson, Dr. Carr personally inspected both the site of the accident and the vehicle following the accident. He also testified that his opinion on the accident reconstruction was based, in part, on his extensive personal experience testing the design and handling of the vehicle model involved in this case. Dr. Richardson's experience testing *any* vehicle was much more limited, and he did not rely on this experience in reaching his accident reconstruction opinion. More importantly, he conducted no tests whatsoever on the model of vehicle involved in this case.

The record is also devoid of any evidence showing that Dr. Richardson employed recognized, reliable scientific or engineering methodology in reaching his conclusion that the Bronco II has handling and stability design defects. What's more: the district court required no such evidence in discharging its gatekeeping function. In general, a district court should require compliance with at least some of the *Daubert* factors in determining whether an engineer's opinion on a design defect is reliable. Engineering is, after all, nothing more than applied science that "rests upon scientific foundations." *Id.* at 150. At a bare minimum, *Daubert's first* factor — "testing" or "falsifiability" — will generally require an engineer to test his hypothesis of design defect. As one of Ford's experts explained, an engineer's evaluation of a vehicle's design involves not only following generally accepted design procedures, but also performing a variety of actual tests on the

design during the development process. This is precisely what Ford did in developing the Bronco II.

Dr. Richardson, however, based his opinion that the Bronco II was defectively designed solely on his review of Ford's internal memoranda, industry comparisons of vehicle rollover rates, and Ford's vehicle testing. While there is a certain logical appeal to the notion that Dr. Richardson's opinion must be reliable if it rests upon data produced by the defendant, the notion does not withstand close consideration. What *Daubert* and *Kumho* require of the proponent of expert opinion is evidence that the methodology underlying the expert's conclusion is "good science" or "good engineering." That means that the plaintiffs were obligated to introduce at least some evidence that Dr. Richardson's method — that is, examining depositions, police reports, photographs of the vehicle, Ford's internal memoranda, industry comparisons of vehicle rollover risks, and Ford's vehicle testing data, but never personally examining the accident vehicle or testing any other vehicle of the same model — is a sound engineering methodology for evaluating vehicle design.

Daubert and *Kumho* teach that whether such methodology is "good engineering" is determined by testing such data for "falsifiability"; considering whether peer review and engineering publications approve of such an approach; considering the rate of error such data might produce; and considering whether the relevant scientific/engineering communities generally accept consideration of such data as a sound methodology for reaching a conclusion about the design of a vehicle. However, Dr. Richardson conducted no "falsifiability" testing at all on a vehicle of the model involved in this case, and although he conducted very limited testing on a Bronco 4X4, a model not involved in this case, he did not base his design defect opinion on such tests; he never subjected his theories or techniques to peer review or publication; he produced no evidence of an error rate or standards controlling his "technique"; and he did not attempt to show that his

"technique" or methodology was "generally accepted" in the scientific community. And the plaintiffs offered no proxies for these indicia of reliability.

The majority is very well aware, of course, of these deficiencies in the plaintiffs' evidence, but seeks to dismiss them as unimportant. With regard to the first *Daubert* factor — "testing" or "falsifiability" — the majority acknowledges that Dr. Richardson never tested his hypothesis but concludes that the district court "'could have'" decided that this failure "went to the weight of [Dr. Richardson's] testimony regarding defects in the Bronco II, not to its admissibility." Whether the court did so or not, we do not know, because the court made no finding on the matter in the record. I agree that, as a general matter, a hypothesis may satisfy *Daubert* even if it is untested by the expert proposing it. However, in such cases the proponent of the testimony must demonstrate other appropriate indicia of reliability. This requirement is all the more critical in a case in which an engineer who conducted no testing is testifying about a design defect, particularly given that actual testing is the principal method employed by the engineering community to prove or disprove an engineering hypothesis. But the plaintiffs submitted no evidence whatsoever that Dr. Richardson employed *any* acceptable scientific/engineering methodology, whether mentioned in *Daubert* or otherwise, to support his conclusion that the Bronco II was defectively designed.

I note in passing that even Dr. Richardson's general qualifications as an expert in vehicle design defect are questionable, given that he has never published a single article on vehicle handling or stability; has never conducted any testing on a Bronco II, the vehicle model involved in this case; and has never designed a vehicle or vehicle components. The only machine Dr. Richardson has designed himself is an okra picker. To be sure, such lack of specific experience will not always disqualify an expert, and Ford does not focus its challenge to Dr. Richardson's opinion on his general professional qualifications. But Dr. Richardson's questionable qualifications

to render an opinion concerning the adequacy of Ford's design of the vehicle *in this case* should at least have signaled to the trial court that the methodology this witness employed to get to his conclusion would require close gatekeeping scrutiny.

The majority further excuses the plaintiffs' manifest failure to introduce proof of the engineering soundness of Dr. Richardson's methodology, and perforce, the reliability of his ultimate opinion in accordance with *Daubert* and *Kumho*, by noting that Ford had an opportunity to cross-examine Dr. Richardson. It is not clear to me how this point is relevant, but in any event, I do not understand the majority's observation to suggest that such cross-examination would properly substitute for a trial court's gatekeeping function. This is not a duty a court may delegate to the jury under any circumstances. It was the trial court's gatekeeping duty to require proof that Dr. Richardson's methodologies were sound as a condition of admitting Dr. Richardson's opinions; the court did not do so and, therefore, the expert's opinion was improperly admitted.

In short, because I believe that Dr. Richardson's testimony should have been excluded, and that the error in admitting it was not harmless, I would reverse the district court's judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NOS. 5:96CV2127
5:96CV2128

John D. Strom, et al.,

and

Delores Clay, et al., Plaintiffs

v.

Ford Motor Company, Defendant/Third Party Plaintiff

v.

William R. Slonsky, Third Party Defendant.

ORDER

The parties have filed a series of motions in limine on the eve of trial. The thrust of the plaintiffs' case lies in the claim that Kathleen P. Clay and Christopher Strom, as back seat passengers, were killed as a result of a defectively designed 1988 Ford Bronco II sports utility vehicle which "rolled-over" in a June 18, 1995 single-car accident on Interstate 77 within the City of Akron. Ford has denied the basic claim, but has filed a third party action against the driver of the Bronco, William R. Slonsky seeking indemnification. Mr. Slonsky has filed a counterclaim against Ford.

I. THE PLAINTIFFS' MOTION (DOCKET #47) REQUESTS AN ORDER PROHIBITING FORD FROM INTRODUCING CERTAIN EVIDENCE.

The evidence sought to be prohibited includes the following:

1. ANY AND ALL ALLEGATIONS REGARDING THE CLOTHING AND PERSONAL GROOMING HABITS OF THE OCCUPANTS OF THE BRONCO II.

The motion is GRANTED.

2. ANY AND ALL ALLEGATIONS THAT ANY OF THE OCCUPANTS OF THE BRONCO II HAD USED CONTROLLED SUBSTANCES ON THE DAY OR NIGHT OF THE ACCIDENT.

The motion is denied as to the occupants, Slonsky and the front seat passenger, Sean Lance, to the extent they appear as witnesses and their credibility is at issue. If it is conceded by plaintiffs, Strom and Clay, that Kathleen Clay and Christopher Strom were not wearing their seat belts, the motion will be GRANTED. However, if one or both plaintiffs dispute the contention of Ford that they were not wearing seat belts, then the motion will be DENIED.

3. ANY AND ALL ALLEGATIONS THAT ANY OF THE OCCUPANTS OF THE BRONCO II USED CONTROLLED SUBSTANCES AT OTHER TIME DURING THEIR LIVES.

The motion is GRANTED.

4. ANY AND ALL ALLEGATIONS THAT WILLIAM R. SLONSKY, THE DRIVER OF THE FORD BRONCO II INVOLVED IN THE ACCIDENT AT ISSUE, HAD INGESTED ALCOHOLIC BEVERAGES DURING THE 12-HOUR PERIOD PRIOR TO THE ACCIDENT.

The motion is DENIED.

5. ANY AND ALL ALLEGATIONS THAT MR. SLONSKY WAS DIAGNOSED WITH ANY KIND OF PSYCHIATRIC DISTURBANCE OR MENTAL DISORDER PRIOR TO THE ACCIDENT.

The ruling is DELAYED until FORD demonstrates how such a diagnoses would be relevant and admissible in the context of Rule 403. The subject is not to be addressed in the opening statement of FORD.

6. ANY AND ALL ALLEGATIONS THAT PLAINTIFFS' DECEDENTS WERE NOT USING THEIR SEATBELTS AT THE TIME OF THE ACCIDENT.

The motion is DENIED as the court is of the view that such testimony is relevant as to proximate cause in the event the jury finds, as alleged, a defect in the design of the Ford Bronco II and is not prohibited by either Ohio statutory law or by Ohio common law.

II. FORD HAS FILED A SEPARATE MOTION IN LIMINE TO ADMIT EVIDENCE OF SEATBELT NON-USE (Docket 54)

The motion is GRANTED. See Section I (6) supra.

III. THE COMPETING MOTIONS REGARDING THE CLAIM OF THE PLAINTIFFS THAT FORD WITHHELD INFORMATION FROM NHTSA. (See Dockets #48, 51 and 52.)

The plaintiffs allege that in previous Bronco II rollover cases, FORD, through counsel has placed heavy reliance on a previous ruling of NHTSA which is presented and argued as proof of the absence of a design defect. The plaintiffs contend that a recent letter dated October 9, 1996 from NHTSA's assistant chief counsel Kenneth Weinstein demonstrates that FORD failed to make a complete disclosure of FORD documents to NHTSA, thus rendering NHTSA's previous ruling suspect.

The court has some difficulty in understanding how the previous ruling of NHTSA is admissible or why counsel for FORD should be permitted, over objection, to discuss the study or the ruling. On the other hand, as the plaintiffs seek punitive

damages, they may be of the view that the NHTSA process is admissible to demonstrate bad faith on the part of FORD on the issues relating to bad faith and punitive damages.

As a consequence, before ruling and before opening statements are made, the court will conduct a hearing at which time, the court will require of counsel a statement as to their plans by way of opening statement and the presentation of evidence as to the NHTSA process and ruling.

Preliminarily, and not as a binding ruling, the court is of the view that in the event FORD intends to argue and introduce in some fashion the NHTSA ruling, the court is inclined to permit introduction of the Weinstein letter under the provisions of Rule 803 (24). However, if the plaintiffs intend to raise, initially, the issue of the NHTSA study and conclusion, the court will likely deny the admission of the Weinstein letter. In any event, the court will defer a ruling until the hearing which will follow the impaneling of the jury.

IV. DEFENDANT FORD'S MOTION CONCERNING DOCUMENT DESTRUCTION ISSUES. (Docket #53)

The court is of the initial view that the evidence concerning document destruction is probably relevant, but even if relevant, Rule 403 may dictate granting the motion. However, the court will delay a ruling on the motion until it has a better understanding of the relevance in the context of the plaintiffs' claim that the destruction of the documents is consistent with a jury finding that the destruction was designed to cover-up concerns of Ford employees with the alleged tendency of the Bronco II as designed and manufactured to "roll-over" at low speeds.

Plaintiffs' counsel is cautioned to not discuss this contention in the opening statement and defendant FORD's counsel is invited to submit a limiting instruction to be given the jury contemporaneously with the admission of the testimony about the missing documents in the event the court concludes the testimony should be allowed.

V. THE MOTION OF FORD TO EXCLUDE OR LIMIT THE TESTIMONY OF DR. MELVIN RICHARDSON. (Docket #56)

This motion was not filed until April 27, 1998 even though it is obvious it is predicated on a ruling rendered on February 6, 1998 decision by Judge Copenhaver in a similar case in U.S. District Court in West Virginia. No good cause having been shown for the delay in filing such an obviously critical motion until one week before the commencement of the trial, the motion to hold a hearing during the trial to determine whether Dr. Richardson will be permitted to testify and opine in this case is DENIED. However, the court reserves to itself the possibility of engaging in a brief voir dire of Dr. Richardson before his testimony is offered.

VI. FORD'S MOTION TO EXCLUDE EVIDENCE OR ARGUMENTS REGARDING WARNING ISSUES.

The court delays a ruling on this motion until the hearing to be conducted after the jury has been selected and prior to opening statements.

VII. FORD'S MOTION TO EXCLUDE EVIDENCE OF MEDIA PROGRAMS RELATING TO THE FORD BRONCO II OR ANY OTHER UTILITY VEHICLE. (DOCKET 55)

Plaintiffs' counsel is directed to avoid any argument concerning media programs in the opening statement and the court will delay a final ruling until the plaintiffs have an opportunity to respond to the motion.

IT IS ORDERED.

/s/ David D. Dowd, Jr.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Caption omitted]

Transcript of Proceedings
Before the Honorable David D. Dowd, Jr.
Senior United States District Judge
May 6, 1998

* * * [338] * * *

THE COURT: May I see counsel at the bench, please?

(Discussion at side-bar on the record).

THE COURT: I always give an instruction whenever I let any opinion testimony come in to describe what it is that it's opinion testimony. But before I do that, I recognize that the defendant filed a motion to quash his testimony, and I overruled it, but is there anything that you wanted advanced now on these various fields that he's moved to be qualified?

MR. DAWSON: You mean do I want to take him on voir dire, an opportunity to take him on voir dire?

THE COURT: Right now.

MR. DAWSON: I'd prefer when we get to a specific topic, otherwise I think it will seem disjointed and hard for the court, too.

THE COURT: I'm either going to let you voir dire him now or I'm going to let him go ahead.

MR. DAWSON: If that's the case, I would want to voir dire him now on his expertise of the dynamics on this particular vehicle and how it weaves.

THE COURT: We're doing it generally, not – he hasn't – he's asked to qualify him generally: Mechanical engineering, machine design, and vehicle design. Is that [338] what you said?

MR. HEISKELL: Vehicle dynamics.

THE COURT: Vehicle dynamics, right, and accident reconstruction. If you want to question him about that generally, fine, but those are broad areas. It seems to me that the kind of questioning you want to do would be best reserved for your cross-examination.

MR. DAWSON: I don't disagree, Your Honor; or foundation objections I think at the appropriate time.

THE COURT: Good enough.

MR. DAWSON: All right, Judge. Thank you.

* * * [423] * * *

MR. DAWSON: Your Honor, as you are aware we have objections to his foundation on the accident reconstruction premised on many things that we filed with a brief that the Court overruled at the time, and I was wondering how you wanted this handled. Is it your belief we should do it solely on cross-examination or on voir dire at this time?

THE COURT: What I would suggest you do is have a continuing objection to his expressing his opinions on accident reconstruction.

MR. DAWSON: That's fine, Judge, as long as the record is protected.

THE COURT: That's why I'm saying that's what you wanted, a continuing objection.

MR. DAWSON: Right. And then the Court can always revisit it after it hears the cross.

THE COURT: I can always revisit it, and as the [424] judge down in West Virginia, if you lose the case I can revisit it at that time. But what I'd rather avoid, both with the plaintiffs expert and your expert –

MR. DAWSON: I agree.

THE COURT: – are continuing objections. Because what happens is it gets impossible for the jury to track what's going on.

MR. DAWSON: Right.

THE COURT: That's why I think a continuing objection noted on the record before any opinions are offered protects you.

MR. DAWSON: That's great, Judge.

THE COURT: At this point.

MR. DAWSON: Is it all right if we do it right here?

THE COURT: Sure. I assume that's what you want is a continuing objection?

MR. DAWSON: It is, Your Honor, on the basis of foundation, lack of investigation, and so forth.

THE COURT: I will overrule it, but it is a matter of record for the appellate court and presumably they'll be able to find it when they review the record, if, in fact, you lose.

MR. DAWSON: Thank you, Judge.

* * * [628] * * *

MR. SMITH: Judge, the first thing we'd like to do for the record is move to strike all of the testimony of Dr. Richardson under the grounds of *Daubert* and Sixth Circuit [629] interpretation.

THE COURT: Overruled.

MR. SMITH: The next motion for directed verdict would be with regard to the design defect, and there are a number of grounds. The first one is that Dr. Richardson did not testify that there was a feasible alternative design which would have prevented the harm which the claimants suffered in this case.

THE COURT: All right. That's overruled. Go on.

MR. SMITH: The second basis for the defect in design is that Dr. Richardson's testimony constitutes junk science which this Court should not consider.

THE COURT: Overruled.

* * *

APPENDIX D

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:96 CV 2127
Case No. 5:96 DC 2128

Dolores Clay, et al., Plaintiffs

vs.

Ford Motor Company, Defendant/Third-party Plaintiff,

vs.

William R. Slonsky,
Third party Defendant/Counter-Claimant.

MEMORANDUM OPINION AND ORDER

(Resolving Docket Nos. 142 and 145,
Docket Nos. 148 and 149)

The above-captioned cases involve product liability claims brought by the estates of two decedents (Kathleen Clay and Christopher Strom) against Ford Motor Company for wrongful deaths caused by the rollover of a Bronco II vehicle designed and manufactured by Ford. Ford brought a third-party complaint against the driver of the vehicle, William Slonsky, who in turn counter-claimed against Ford.

Following jury verdicts and compensatory damages awards in favor of the plaintiffs and the counter-claimant,[1] several motions were filed. The motions were fully briefed and, on

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[1] Because the interests of the plaintiffs and the counter-claimant are essentially aligned, for convenience the Court will hereafter refer to the two estates and Slonsky collectively as "plaintiffs."

August 25, 1998, the Court conducted a hearing specifically on the motions for prejudgment interest. The various motions are now resolved as set forth below.

1. Defendant Ford Motor Company's Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial as to Liability Determination (Docket No. 149)

Pursuant to Fed. R. Civ. P. 50(b), Ford filed this motion for judgment as a matter of law on the ground that there was no legally sufficient evidentiary basis for a reasonable jury to have ruled in favor of the plaintiffs as to liability. In the alternative, pursuant to Fed. R. Civ. P. 59(a), Ford moves for a new trial as to liability on the ground that the jury verdict was against the weight of the evidence.

In the face of a Rule 50 challenge to the sufficiency of the evidence supporting a jury's findings, this court "must apply the forum state's standard of review[.]" *Hostetler v. Consolidated Rail Corp.*, 123 F.3d 387, 390 (6th Cir. 1997). See also, *J.C. Wyckoff & Associates v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1482 (6th Cir. 1991) ("this circuit adheres to the minority rule that state law governs the standard for granting motions for directed verdicts and judgments notwithstanding the verdict"). Under Ohio law,

> [t]he evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon [the motion].

Posin v. A.B.C. Motor Court Hotel, Inc., 45 Ohio St.2d 271, 275, 344 N.E.2d 334 (1976).

Ford argues that it is entitled to judgment as a matter of law for several reasons: (1) plaintiffs failed to meet Ohio's requirement in a product liability case that there was available a practical and technically feasible alternative product design which would have prevented the harm for which damages were sought and which would not have substantially impaired the usefulness or intended purpose of the product; (2) plaintiffs failed to establish a design defect; and (3) plaintiffs failed to establish that the challenged design was the proximate cause of the harm.

The Court notes as an initial matter that Ford chose not to challenge plaintiffs' claims by way of a summary judgment motion. From the beginning of this case, Ford has relied upon a theory that the accident was caused not by any defect in the Bronco II but by the driver's desire and attempt to commit suicide. One can deduce from this that Ford believed it had a "winner" on the suicide argument but not on the design defect claim. In his opening statement to the jury, Ford's counsel emphasized that an EMT at the accident scene would testify that Slonsky told her he "had been thinking about killing himself[ ]" and that he "started moving the steering wheel back and forth and the vehicle rolled over." (Trans. Vol. I at 36). This testimony was reemphasized in the closing argument. (Trans. Vol. VIII at 1369; 1387-1390).

Now that a trier of fact has reached a verdict against Ford, on evidence which Ford knew about when it advanced its suicide theory, Ford urges this Court to issue judgment as a matter of law on the ground that the evidence was insufficient to support the jury's verdict. However, as set forth below, a review of the record, "[when] construed most strongly in favor of the [non-movants], [shows that] there is substantial evidence to support [their] side of the case, upon which reasonable minds [might] reach different conclusions[.]" *Posin supra.*

Ford asserts that plaintiffs failed to offer substantial evidence of a design defect and of the availability of a practical and technically feasible alternative design because they relied

solely on the testimony of their expert, Dr. Melvin Richardson, who "exhibited a complete lack of foundation for his expert opinions." (Motion, Docket No. 149, at 2). This assertion fails to take into account the fact that plaintiffs, in their case in chief, offered extensive designated deposition testimony[2] of Ford's own engineers who worked on the design of the Bronco II. This testimony, independent of Dr. Richardson's testimony, established facts regarding the design of the Bronco II as well as facts about available alternatives, which the jury could have accepted as true.

Testimony of Mr. Parrill, a Ford engineer,[3] established the following facts:

(1) Ford knew the prototype[4] had a stability problem in 1981 (Trans. Vol. 11 at 77);

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[2] Because the parties designated a significant amount of deposition testimony for admission into the record, rather than read all of this testimony to the jury, the Court encouraged counsel to agree on summaries of what each of the deponents had to say. They were able to do so and the summaries, not the actual depositions, were read to the jury. The Court first instructed the jury about the use of deposition testimony in general and specifically about the "summary" method that was to be used in this trial. *(See* Trans. Vol. II at 71-74).

[3] Except where otherwise indicated by footnote, these facts are established from the summary of the designated deposition testimony of Fred Parrill who, "[i]n the early 1980s . . . was an executive engineer responsible for chassis engineering in the light truck department [of Ford] . . . [and, specifically,] . . . was assigned the chassis engineering responsibilities for the Bronco II program." (Trans. Vol. II at 74-75).

[4] Another Ford engineer, Richard Antoun, described a "prototype vehicle" as "a pre-production concept vehicle that incorporates the various parts the engineers feel will eventually be released on a production level sold to the public." (Trans. Vol. II at 98). He stated that "prototype vehicles are not sold to the public." *Id.*

(2) Ford had five alternatives for addressing the problem, which represented a range of improvement in the stability index[5] of the Bronco II from 1.85 to as high as 2.25 (*Id.* at 77);

(3) Ford chose Proposal No. 2, which caused no interference with the Job One[6] target date *(Id.* at 77-78);

(4) Proposal No. 2 offered a maximum stability index of 2.03 (*Id.* at 79);

(5) By August 28, 1981, the mechanical prototype Bronco II "[r]equire[d] improvements in directional stability, lane changes, roll control and cornering" (*Id.* at 78);

(6) Even after Proposal No. 2 was implemented, J-turn maneuvers conducted on the Bronco II resulted in "outrigger contact[7]. . . on every test run at speeds over 25 miles an hour" (*Id.*, footnote added);

(7) Ford engineers suggested an increase in track width of at least two inches and a reduction in wheel size to 14 inches *(Id.* at 80);[8]

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[5] "Stability index" is "a ratio involving the track width of the vehicle and the height of the center of gravity." (Trans. Vol. II at 76).

[6] "Job One" refers to the target date for production of the very first of whatever vehicle is being designed. Job One for the Bronco II was January, 1983. (Trans. Vol. II at 75-76).

[7] "For outrigger contact to occur, you have to have wheel lift on at least one wheel. Outriggers are placed on the vehicle to allow the test drivers to test the limits of the vehicle within the test parameters and to prevent the vehicle from actually rolling over, thus potentially injuring the driver." (Trans. Vol. II at 79-80).

[8] On cross examination of engineer Richard Antoun, he stated that, although Ford's design group did consider increasing the track width,

(8) It was technically feasible for Ford to have released the Bronco II with 14-inch wheels and a track size increased three to four inches *(Id.)*;

(9) These changes would have put the Job One date "[i]n serious jeopardy" and would "almost certainly" have increased "[t]he program cost, weight and investment status" (*Id.* at 81);[9]

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it found that use of "a different type of front stabilizer bar . . . significantly improved the handling characteristics of the vehicle." (Trans. Vol. II at 104-105). However, another Ford engineer presented by the plaintiffs, James McClure, testified that this stabilizer system was never tested on the test track; it was tested only by computer simulation. (*Id.* at 123). He further testified that "[a]nother reason why Ford's management didn't want to widen the Bronco II was because of its desire to keep the vehicle narrow in order to be able to market the Bronco II in Japan." (Id. at 108). During his cross examination, McClure stated that the "new stabilizer bar system . . . was much more effective and essentially gained the performance Ford was looking for in the Bronco II." *(Id.* at 119).

[9] James McClure also testified on direct that the Antoun group's recommendation, based on testing in mid-March of 1982, that increased track width of three to four inches was advisable, "would most likely cause a delay in Job One and Ford knew that Chevy was coming out with the S-10 Blazer in the early fall of 1982. As matters stood, if Ford kept Job One it would still be six months behind Chevy." (Trans. Vol. II at 109).

(10) From April or May of 1982 through production, Ford did no more real-life J-turn testing,[10] but instead did only computer simulations (*Id.*);[11]

(11) Shortly before production in the fall of 1982, some changes were made to the Bronco II but they were "pretty much cosmetic" (*Id.* at 82-83).

Mr. Parrill also testified that "Ford would not want to put or allow on the market a vehicle which they [sic] thought would roll over if the driver in a panic situation, such as trying to avoid a child, swerved or jerked the steering wheel." (*Id* . at 85).

To counter the above testimony, Ford presented the following facts, also from Mr. Parrill's deposition unless otherwise indicated:

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[10] In his cross examination testimony, James McClure stated that "[i]n a J-turn test you drive a vehicle down the road at a given speed and then make a steering wheel input and hold it. One full revolution of the steering wheel is 360 degrees. If you have both hands on the steering wheel about the best you can do is probably 180 degrees." (Trans. Vol. II at 117).

[11] Richard Antoun, on cross examination testimony offered by Ford, stated that J-turn tests were done to "correlate" to the computer program. (Trans. Vol. II at 102). The computer simulations allowed Ford to "evaluate a lot of difference [sic] designs much quicker because it didn't have to go through and produce actual parts, put them on a physical vehicle, and run a test on a test track for each different design." (*Id.* at 102-103). James McClure, on direct, testified that, to his knowledge, this was the first time testing had been done by means of computer simulation and that the "technology was just coming on board." (*Id.* at 122-123).

(1) Ford conducts "exhaustive testing of its products using a number of different procedures" (Trans. Vol. II at 86);[12]

(2) "[T]he J-turn maneuver was [not] the focused and principal development tool in the Bronco II program" (*Id.*);[13]

(3) "If there had been concerns about the safety of the Bronco II prior to Job One that were not resolved, Ford simply would not have gone into production with it." (*Id*);

(4) "Ford has delayed the introduction of many new products because it wasn't satisfied" (*Id.*);

(5) When Ford conducted the J-turn maneuvers in the spring of 1982, "it expected and intended the prototype versions of the Bronco II to tip up and for the outriggers to contact the ground . . . [so as] to find out the limits of the vehicle under various combinations and the drivers intentionally pushed the vehicles until outrigger contact occurred." (Id. at 89);

(6) "The vehicles tested were prototype vehicles and not the vehicle that was released to the public." (*Id.*);

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[12] Richard Antoun confirmed that "Ford ran various types of tests on the Bronco II before selling it to the public." (Trans. Vol. II at 100).

[13] James McClure, during cross examination, testified that Ford also did lane change maneuver tests. "In that test there was a pylon course set up with specific gates and the test driver would make a rapid steering input to have the vehicle change lanes and then recover into the next lane." (Trans. Vol. II at 118).

(7) Mr. Parrill knew of "no direct correlation between a vehicle's static stability index and its dynamic performance." (*Id.*);[14]

(8) In Mr. Parrill's opinion, "handling and stability characteristics of the Bronco II were fully and carefully tested and evaluated prior to its release for sale to the American public." (*Id.* at 90).

(9) Mr. Parrill himself "leased and drove a Bronco II as his personal family vehicle." (*Id.* at 91).

The plaintiffs also produced testimony from Richard J. Antoun, a Ford engineer since 1972, that in August of 1982, under instructions, he collected all documents relating to the design of the Bronco II and thereafter, before Job One, "sanitized" them, which he defined as "to look at a document for clarity and accuracy and correct any issues on the document that may not be clear and correct." (Trans. Vol. II at 96-97). Testimony presented on cross examination was that marginal notations were made on some documents "because there was some terminology used that was unclear and ambiguous and easily could be misinterpreted by someone who didn't understand what the document process consisted of." (*Id.* at 106).

Plaintiffs also offered the designated deposition testimony of James McClure, another Ford engineer involved in the "ride and handling aspects of the development of the Bronco II[.]" (*Id.* at 107). He stated that "[t]he reason Ford stopped J-turn testing in limits maneuvers in May 1982 was because in one of the maneuvers a Bronco II had gone up on two wheels, the outrigger failed and dug into the cement and 'Pole vaulted the vehicle over,' and Ford was concerned about the safety of its test drivers." (*Id.* at 107-108). However, on cross examination

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[14] Similarly, James McClure testified on cross examination that "[t]he static stability index has very little effect on how the vehicle performs overall." (Trans. Vol. II at 119).

he stated that he was so enthusiastic about the Bronco II that he "made sure he had one of the first ones when the vehicle was first sold to the public in 1983." (*Id.* at 121). He used the vehicle as his principal family vehicle and felt the vehicle was fine for his children to drive. (*Id.*).

As far as Ford's argument that plaintiffs failed to establish design defect, as opposed to failure to wear seat belts, as the proximate cause of at least the deaths at issue here, the jury might certainly have concluded on the evidence that had there been no rollover, seatbelts on the backseat passengers would have never become an issue. The fact that a jury *might* also have concluded that even had there been injuries there might not have been deaths if the passengers had been wearing seatbelts is not the issue. Those kinds of choices are made by juries all the time. That is precisely their role: to decide which of two stories makes the most sense to them based on the evidence. This Court cannot conclude that there was insufficient evidence for the jury to conclude that a design defect, not the lack of seatbelts, proximately caused the deaths of plaintiffs' decedents."[15]

As stated in the introductory paragraphs of this section, under Ohio law, construing the evidence most strongly in favor of the plaintiffs and without weighing the evidence or judging the credibility of the witnesses, since there is substantial evidence to support plaintiffs' side of the case, upon which reasonable minds may reach different conclusions, Ford's motion for judgment as a matter of law must be denied. *Posin, supra.*

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[15] Seatbelt use is not an issue with respect to the counter-claimant Slonsky because he *was* wearing his seatbelt, a fact which his attorney used as proof that he could not have been trying to kill himself by rolling over the vehicle. The jury was certainly free to conclude, based on common sense, that if he had been trying to commit suicide he probably would not have belted himself in.

Turning now to the alternative: a new trial as to the liability determination, the Court finds Ford's position to be equally lacking in merit. "[T]he question of whether a new trial should be ordered is determined with reference to federal procedural law." *Porter* v. *Lima Memorial Hospital*, 995 F.2d 629, 635 (6th Cir. 1993). A new trial is properly granted where a verdict is against the weight of the evidence. The Sixth Circuit has stated:

> One who challenges the weight of the evidence argues that the jury's verdict, although supported by some evidence, is still clearly against the weight of the evidence. Unlike motions for directed verdicts and judgments notwithstanding the verdict, in ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, the trial court must compare the opposing proofs, weigh the evidence, and set aside the verdict if it is of the opinion that the verdict is against the clear weight of the evidence. *TCP Indus., Inc.* v. *Uniroyal Inc.*, 661 F.2d 542, 546 (6th Cir. 198 1). It should deny the motion if the verdict is one which could reasonably have been reached, and the verdict should not be considered unreasonable simply because different inferences and conclusions could have been drawn or because other results are more reasonable. *Id.*

J.C. Wyckoff & Associates, 936 F.2d at 1487. *See also Porter* v. *Lima Memorial Hospital*, 995 F. 2d at 635 (verdict must be set aside if it is against the clear weight of the evidence but not if it is one which could reasonably have been reached).

For this part of its motion, Ford essentially relies on the same arguments as when requesting judgment as a matter of law.[16] Ford argues that plaintiffs presented testimony of only

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[16] The Court notes that plaintiffs' brief (Docket No. 158) does not directly address this portion of the motion. The Court has been left to its own devices to search out the position contrary to Ford's position. However, the Court also notes that just because a party fails to argue

one expert, Dr. Richardson, who had never actually ridden in or tested a Bronco II, had not personally inspected the vehicle or spent much time at the accident site, and allegedly derived the bulk of his knowledge not from independent testing and evaluation but from his interpretation of Ford's internal documents. Ford argues that, in contrast, it offered the testimony of the two principal engineers of the Bronco II who "gave extensive testimony concerning the design and development of the Bronco II." (Motion at 13).

Once again this fails to recognize that a significant portion of that "extensive testimony" of Ford's own engineers, placed in evidence by the plaintiffs, supported the plaintiffs' position. It is not impossible to weigh this testimony and conclude that the scale tips in the plaintiffs' favor.

Ford also asserts that it submitted the accident reconstruction testimony of Lee Carr who opined that "the design of the Bronco II had nothing to do with the accident which occurred on June 18, 1995." (Motion at 13). Ford concludes that "[w]hen compared to what Dr. Richardson had to offer the jury, the comparison of proofs is overwhelming in Ford's favor." (*Id.*).[17] Ford, however, does not itemize the

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a point does not mean that the movant automatically wins on that point.

[17] Ford points out the Mr, Carr has a "wealth of experience [in] testing [] multipurpose vehicles[,]" that he "has undertaken hundreds of tests and evaluations, many of which have nothing to do with any particular litigation," and that "[b]ased on these *independent* tests and evaluations, Mr. Carr was able to reach his conclusion that the Bronco II is a safe, stable vehicle which was appropriately designed." (Motion at 13, emphasis added). At the trial, when Ford cross-examined Dr. Richardson, counsel attempted to discount his credentials by eliciting testimony that Richardson had never actually "work[ed] as an engineer for any automotive company or even automotive supplier[.]" (Trans. Vol. III at 455). The suggestion was that Dr. Richardson, notwithstanding his training and experience, was incapable of truly

testimony of either expert nor make any point-by-point attempt to show *why* it believes that Mr. Carr's testimony tips the scale overwhelmingly in its favor."[18] On a motion for new trial, the burden is on the movant to set forth with specificity the evidence offered by each side so that the Court can analyze which side has "the clear weight of the evidence" in its favor."[19]

Finally, Ford asserts that it offered unrefuted testimony that it was failure to wear seatbelts rather than any defect in the vehicle which was the proximate cause of the injuries here. This issue was discussed above and need not be revisited.

The Court concludes that the jury's verdict was not against the clear weight of the evidence. Accordingly, Ford is not entitled to a new trial on liability.

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understanding the nuances of designing a motor vehicle. It is entirely possible, however, that a jury would consider Dr. Richardson, with no agenda to protect an industry that directly provides his livelihood, as being as independent as Mr. Carr was when he was conducting tests "hav[ing] nothing to do with any particular litigation." Therefore, there is no necessity to place more weight on Mr. Carr's testimony than on Dr. Richardson's simply on the basis of their experience as opposed to their training in engineering.

[18] It can come as no surprise to anyone, even jurors unschooled in the intricacies of the law and courtroom procedure, that Ford's expert was going to opine that no defect in the Bronco II caused the accident while plaintiffs' expert would opine the opposite. The mere fact that the two experts reached opposite conclusions has no significance at all, much less overwhelming significance.

[19] Even though the trial transcript may not have been available at the time of the filing of the motion, Ford certainly had its own trial notes to go on and could have set forth its argument with greater specificity. It has failed to do so and the Court has no obligation to sua sponte comb through the transcript, especially in view of the detail set forth in the discussion above.

In summary, Ford's motion for judgment as a matter of law (Docket No. 149, Part 1) is DENIED. Further, Ford's motion for a new trial as to liability (Docket No. 149, Part 2) is DENIED.

II. Defendant Ford Motor Company's Motion for New Trial or, in the Alternative, for Remittitur as to Damages Determination (Docket No. 148).

Pursuant to Fed. R. Civ. P. 59(a), Ford filed this motion for a new trial on the grounds that the jury's damages awards were improperly influenced by bias and prejudice, were clearly excessive and/or were against the weight of the evidence. In the alternative, pursuant to Fed. R. Civ. P. 59(e), Ford moves for a remittitur reducing the jury's damages awards to reasonable amounts consistent with the damages testimony adduced at trial.

Rule 59(a) permits the granting of a new trial "in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States[.]" The Sixth Circuit has stated that a new trial is warranted

> when a jury has reached a "seriously erroneous result" as evidenced by: (1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, *i.e.*, the proceedings being influenced by prejudice or bias.

Holmes v. *City of Massilion, Ohio,* 78 F.3d 1041 (6th Cir.) (citations omitted), *cert. denied,* 117 S. Ct. 312 (1996). A court may deny a motion for a new trial on the condition that the plaintiff accept a remittitur of the jury verdict. *Jackson v. City of Cookeville,* 31 F.3d 1354, 1358 n. 4 (6th Cir. 1994) (citing *Dimick* v. *Schiedt*, 293 U.S. 474, 482 (1935); *Smith* v. *John Swafford Furniture Co., Inc.*, 614 F.2d 552, 553 (6th Cir. 1980)).

In this motion, Ford asserts that it is entitled to a new trial for all three reasons cited by *Holmes*. First, Ford argues that evidentiary errors committed by this Court and the fact that

the jury was improperly allowed to consider the question of punitive damages tainted the jury's deliberations and decision regarding compensatory damages, even though punitive damages were not ultimately awarded.[20] Ford also asserts that plaintiffs' counsel made inflammatory remarks during the damages phase closing arguments regarding "sending a message" to Ford and that, although the Court admonished counsel, these remarks had their desired effect. Second, Ford argues that the damages awards were excessive and "beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss." *Hill v. Marshall*, 962 F.2d 1209 (6th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993). Finally, Ford argues that the awards were against the clear weight of the evidence, in that there was little evidence from which the jury could properly determine compensatory damages let alone damages in the amount awarded.

The Court bifurcated liability from damages.[21] At the beginning of the damages phase, the Court instructed the jury prior to taking any testimony so the jury would have the benefit of the instructions as it listened to the testimony. General damages instructions were first given as follows:

> The fact that I am instructing you on the proper measure of damages should not be considered as an indication of any view of mine as to the issue of damages. Instructions as to the measure of damages are given only for your guidance in determining whether an award of damages would be appropriate in the event the plaintiffs meet their burden of proving by a preponderance of the evidence both the existence of

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[20] Ford also asserts that time constraints placed on it during the damages phase and this Court's refusal to grant a directed verdict on the question of punitive damages resulted in juror bias and prejudice.

[21] The transcript of the damages phase of the trial is located at Docket No. 177.

damages and that the damages were proximately caused by the defendant's conduct.

You must determine from the preponderance of the evidence an amount of money that will reasonably compensate the plaintiffs for those injuries or damages proximately caused by the defendant's conduct. The damages you award must be fair compensation, no more and no less.

You are not permitted to award speculative damages. The fact that the precise amount of damages may be difficult to ascertain does not preclude the right of recovery for future damages.

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guess work. On the other hand, the law does not require that the plaintiffs prove the amount of their losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

(Trans. Vol. X at 1470-71).

The Court then instructed the jury regarding damages for the wrongful death claims brought by the estates of the two decedents:

Dolores Clay has asserted a wrongful death claim on behalf of the Estate of Kathleen Clay and John Strom has asserted a wrongful death claim on behalf of the Estate of Christopher Strom. The amount of damages recoverable in an action for wrongful death depends on the loss resulting to the beneficiaries of each estate.

You are instructed that the parents and brothers and sisters of Kathleen Clay and Christopher Strom are the beneficiaries of their decedents' estates. Further, under Ohio law, the parents are presumed to have suffered damages by reason of the wrongful deaths of their children. The siblings of the two decedents must prove their damages by a preponderance of the evidence.

The damages recoverable consist of the amount which would fairly compensate the beneficiaries for the loss resulting to them from the death. In determining the amount of damages, you may consider all factors existing at the time of the decedent's death that are relevant to a determination of damages suffered by reason of the wrongful death. There must be evidence of each element of damage you include in your award. These factors include the following:

(1) Loss of services;

(2) Loss of the society of the decedent, including loss of companionship, care assistance, attention, protection, advice, guidance, counsel, instruction, training and education;

(3) Loss of prospective inheritance to the decedent's heirs at law at the time of death; and

(4) The mental anguish incurred.

(Trans. Vol. X at 1471-72).

The Jury was then instructed as follows with respect to the damages of the counter-claimant, Slonsky:

If you find that Mr. Slonsky suffered damages which were proximately caused by Ford, you may award such damages as may seem just and fair. Such damages may include the following: (1) physical and mental pain

> and suffering; (2) medical and hospital expenses; and (3) mental anguish.

(Trans. Vol. X at 1472-73).[22]

Following testimony,[23] which will be set forth below in detail, counsel for the parties made their respective arguments.

Counsel for the Strom estate and the Clay estate began his argument with the punitive damages issue and spoke at length on that. Then co-counsel addressed the issue of compensatory damages as follows:

> Ladies and gentlemen, I have been sitting here quite frankly trying to think of what I can tell you with respect to the compensatory damages in this case. But I'll be honest with you, I'm not sure what I have to say, my words would add anything to the moving testimony of Mr. John Strom and his family and Delores Clay and her family. But I would like to start by simply saying in a perfect world we would have perfect justice and if we had perfect justice I could stand up here today and tell you, the jury[,] the only thing we want is to have Kati

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[22] The jury was also instructed regarding punitive damages and the following special interrogatory was given to the jury:

> Interrogatory No. 3: Do you find by clear and convincing evidence that Ford manifested a flagrant disregard for the safety of persons who might be harmed such that the following are entitled to punitive damages as result of Ford actions?

The jury responded "no" as regards both the two decedents' estates and as to Slonsky. Therefore, no punitive damages were awarded. (Trans. Vol. XI at 1666-1667).

[23] In addition to testimony offered by parties and family members, Roger Maugh, director of Ford's Automotive Safety Office during the time the Bronco II was under design, and Lou Camp, the present director of the Automotive Safety Office, also testified. Their testimony was aimed at fending off a punitive damages award.

and Chris back, and if we were able to do so that they could walk through the doors of this courtroom, embrace their respective families and all the pain would be gone. We can't do that. That's not an option. Under our system the option is money damages.

Getting back to my original question, so what do we do. We can't bring Kati and Chris back and it's really impossible to put a number on the loss of these promising young lives but I would ask you to keep this in mind, in this day and age where athletes are receiving millions of dollars for playing a seasonal game or where corporate executives are receiving tens of millions of dollars for bonuses for doing a great job, we have to know that the value of the lives of these children is substantial.

Lastly, I just want to say that these families have been through a terrible, terrible ordeal. And of course they have taken comfort in each other, they have taken comfort in their religion, and the Bible of course is a great source of comfort, such as this passage from St. Mark. "Suffer the little children to come unto me and forbid them not for such is the kingdom of God."

I ask you to do the right thing for the families of these two promising young people. Thank you.

(Trans. Vol. X at 1624-27).

Slonsky's attorney then spoke briefly of his physical injuries, but concentrated on the mental anguish suffered by Slonsky:

I want to talk to you about pain, real pain and I know that this jury will not come under any type of a theory that if it doesn't bleed it doesn't hurt because I think the testimony that you heard in this case is consistent with someone who has tons of pain, intense pain, so much pain, so much pain, that in order to relieve

his guilt he tries to kill himself twice on the night of the accident. So much pain that he tries to disassociate himself with his closest friends, to try to forget.

* * *

I want to talk to you about his general damages. I want to tell you that his damages are the same as the Strom family and the Clay family, that parents worst nightmare. I don't know how it can be equaled, but in comparison to the damages one thing you should remember, Chris and Kati are at peace now; Bill's not. Please remember that when you're assessing compensatory damages in this case.

(Trans. Vol. X at 1628-29). The remainder of counsel's argument went to the issue of punitive damages.

Counsel for Ford made his closing argument with respect to compensatory damages as follows:

What I have tried to do here is I have tried to address — I don't think I can address the issue of compensatory damages. I don't think anyone can. I think that's an issue solely in your providence. For me to get up here and say what a life is worth is just not appropriate or proper. But I think what we ought to focus on and look at is whether or not the claim of punitive damages is appropriate and proper in this case.

(Trans. Vol. X at 1631). The remainder of counsel's argument related solely to the issue of punitive damages.

On rebuttal, plaintiffs' lawyer stated in part:

This is your opportunity, ladies and gentlemen of the jury. Compensate the victims who remain behind. Yes, compensate them with that sense that you bring into this courtroom, that life experience that each of you has in terms of loving and honoring a memory of somebody that you love.

(Trans. Vol. X at 1653-54).

The Court will first address Ford's motion as it relates to Slonsky. In the damages phase of the trial Slonsky testified that the only physical injury he suffered in the accident was "road rash" on his right arm and the top of his head. He indicated that these had completely healed and he has no physical problems as a result of them. (Trans. Vol. X at 1479). He further testified that after the accident he returned to his job at Sears but found it "incredibly hard to concentrate." He started being late for work on a regular basis. Sears asked him to resign in January of 1996. Since then, he has been unable to hold any job for more than a few months. (*Id.* at 1480). On cross examination, however, he acknowledged that at his deposition he had stated that he left Sears "to explore other options" and because he "wasn't very happy with the job." (*Id.* at 1492).

When asked about his recollection of the accident, he testified that when the vehicle began to roll he was "terrified" because he "couldn't regain control," and all he could hear was glass breaking, everything was so loud." (*Id.* at 1482). When the rolling stopped he got out of the car. There was "[b]lood everywhere." He "saw Chris [Strom] laying on the road. He had blood all around him." (*Id*). He did not see Kati Clay and he "thought she was in pieces." (*Id.* at 1483). He stated: "I felt so incredibly responsible for what happened, I didn't want to live anymore. I felt guilty." *(Id.*). At the scene of the accident, Slonsky tried at least twice to jump off the overpass into the traffic below. He had to be restrained by Sean Lance, the front seat passenger who also survived the accident, and later by a paramedic and a witness. (*Id.* at 1483-84).

Slonsky was treated for his minor injuries at the hospital and thereafter taken to the inhouse psychiatric unit at St. Thomas Mental Health Center where he stayed for one week. (*Id.* at 1485). He testified that his "mental problems" have continued and that he got counseling for a short time from a Ms. Shaffer and a Mr. Huhn, but that he discontinued both because he could not "relate" to either of them. (*Id.* at 1485-86). He had

trouble concentrating and could not sleep. He had nightmares, including one recurring nightmare where he could hear Kati calling for help and another where he managed to get the Bronco under control and nobody was hurt. (*Id.* at 1486-87). After the accident his family physician put him on an antidepressant, but it did not seem to work so he quit using it. (*Id.* at 1488). On cross examination, he admitted that he never told this to his doctor and never tried to get a different treatment. (*Id.* at 1493). He tried heroin after the accident, but admitted on cross that he had previously tried marijuana a few times. (*Id.* at 1493, 1496). He stated that he tried to disassociate from his old friends and that he had trouble maintaining relationships. (*Id.* at 1488, 1490-91).

Amanda Markovitz, Slonsky's girlfriend of a few years, testified that before the accident he smiled a lot, was real outgoing and was always a very funny individual. (*Id.* at 1500). After the accident, he was withdrawn and did not like to be around people. He lost his sense of humor and his drive to do anything. (*Id.* at 1501-02). She said that he "flies off the handle quite often and very easily[,]" a trait that was "not as prominent" before the accident. (*Id.* at 1502). She testified that she never dated him after the accident because it was "too stressful" since all he wanted to do was "talk[] about Kati and Chris." (*Id.* at 1502-03). On cross examination, she stated that she had recommended that he get some counseling but that she did not know whether he ever did. (*Id.* at 1503).

Dr. Ralph Huhn, the second of Slonsky's counselors, testified that after the accident Slonsky was "very distraught and upset and suicidal." (*Id.* at 1506). Huhn diagnosed Slonsky with Post Traumatic Stress Disorder, "an anxiety kind of a disorder that occurs after an individual has been in a very traumatic, potentially life-threatening experience." (*Id.* at 1507). He described the symptoms of the disorder as follows: "reexperiencing the event in one way or another while awake or in dreams, nightmares. There's often a tendency to deny parts of what has occurred, there's often guilty feelings involved and

associated anxiety disorders, anxiety kinds of symptoms, disturbed sleep or appetite, exaggerated startled reaction, a variety of things." (*Id.* at 1507-08). In Huhn's opinion, the disorder was caused by the accident. (*Id.* at 1509). He also doubted that Slonsky's symptoms were cured when Slonsky voluntarily terminated their relationship in July of 1996. He believes that Slonsky "was not really ready to deal with the whole thing yet." He wanted to talk about everything but what was the problem. (*Id.* at 1509-10). On cross examination, Huhn, who was a psychologist, stated that he had not referred Slonsky to a psychiatrist because he was already on some medication from another physician. (*Id.* at 1511). He also admitted that Slonsky "sort of discharged himself" and just "dropped out of treatment." The last time Huhn saw Slonsky was July 15, 1996, a little more than one year after the accident. (*Id.* at 1511-13).

The jury awarded Slonsky $3.5 million in compensatory damages. No punitive damages were awarded. Although the testimony suggested that he has indeed suffered as a result of the accident, he has no permanent physical injuries, no physical injuries which caused him an inordinate amount of pain for even a short while, and no significant medical bills resulting from those physical injuries. His testimony does suggest that the actual accident was, not surprisingly, a very terrifying experience, made even more terrible when he saw his friends in the roadway and realized they were dead. There is plausible evidence that his personality has changed since the accident and that he has suffered psychological trauma which he may not yet have been able to fully face. All that having been said, and recognizing that pain and suffering and mental anguish are subjective elements which are hard to quantify, the Court is convinced, having heard all the testimony and having reviewed it in transcript form, that there is simply not enough evidence to support the *amount* of the award to Slonsky.

Accordingly, the Court will deny the motion for new trial on damages as to Slonsky conditioned on his acceptance of a remittitur in the amount of $2,000,000.00 for a resulting

damages judgment against Ford Motor Company in the amount of $1,500,000.00. Failing such acceptance, a new trial will be granted Ford on Slonsky's compensatory damages.

The Court will now address Ford's motion as it relates to the claims of wrongful death brought by the two decedents' estates.

At the damages phase of the trial, Rev. John Strom, the father of the decedent, Christopher Strom, testified that the family was close. (Trans. Vol. X at 1519). He and his wife, Mary, have five children: Wendy, Brian, Chris, Karen, and Debra. Wendy is 36 years old and Debra is still in college. (*Id.* at 1515). Chris was born in 1969. He graduated as valedictorian of his high school class and received scholarships for college. He went to the University of Toledo and graduated cum laude with a degree in astrophysics. (*Id.* at 1516). Rev. Strom described Chris as "a very unique young man." He "had a mind that was constantly examining things, constantly struggling with things, constantly trying to understand, but coupled with this was a tremendous sense of humor." They called him the "family comedian." (*Id.* at 1517-18). Chris had a great love for his mother and would "talk at great length about a lot of things" with his father. (*Id.* at 1519). He related well with his sisters and brother, especially Karen and Debra. (*Id.*).

The day of the accident was Father's Day. They had gone over to show Chris a house they were going to buy because Rev. Strom was retiring. (*Id.* at 1520). Chris and Kati had plans to go out for the evening. (*Id.*). Around 10:30 p.m. the phone rang and somebody told them to come to Akron General Hospital because there had been a very serious accident. He, his wife, Wendy and Debra went. Karen and her husband were gone. Brian stayed home to field any calls. (*Id.* at 1521). Rev. Strom remembers that he felt extreme fear when they got to the hospital and were told to go into a small room, which in his role as a pastor, he had entered many times with other people. He knew what was coming; he knew the room "is used only to tell families that there's an extremely serious medical condition or

death." (*Id.* at 1522). After they were told that Chris was dead, he went in to see Chris. The rest of the family "didn't feel strong enough, didn't feel that they could go." (*Id.*).

Rev. Strom testified that what he will miss most is "the opportunity to see what might happen to a young man who had the ability and the mind that he had because he wasn't even — hadn't even begun to use all of the gifts he had been given." *(Id.* at 1524). Rev. Strom said that he loved Chris as much on the day of the accident as on the day of his birth, when he had experienced "an absolute sense of wonder[.]" (*Id.* at 1523-24).

Mary Strom, Chris's mother, testified that on the night of the accident, she had gone to bed early because she had to work the next day. Her son Brian woke her up and told her the hospital had called and Chris was in an accident. (*Id.* at 1534). As they drove to the hospital it was "like opening the flood gates." (*Id.* at 1535). She was trying to prepare for what she was afraid they would hear. (*Id.*).

After the accident, she asked the children to go through Chris's personal effects because she was "just unable to help with that." (*Id.* at 1535). The children knew she would want some things as mementos; so they packed them in boxes and put them away. Later she was able to look at them. It was then that she discovered the Pooh Bear they had given Chris as a baby, which he had all through school and kept on his bed when he was in college. He planned to take it to California when he moved there to look for a new job. She now has it on their bed and "it speaks to me of the joy of his life now where I couldn't look at it before." (*Id.* at 1535-36).

Chris's sisters, Wendy and Debra, also testified. They told how they were all home on Father's Day preparing to celebrate Chris's birthday, which had actually been the day before but which they were going to celebrate on Monday. (*Id.* at 1528). Wendy says she thinks of her brother every day, that she misses talking to him, and the way he always brought a new perspective to things. She misses being able to see him with

children of his own because she thinks he would have been a good father. (*Id.* at 1528-29). Debra was seven years younger than Chris. Because they were very much alike, she admits they did not always get along, but they still strongly identified with each other. She described him as having a great sense of humor. When she heard about the accident, she was at home making Chris a cheesecake for his birthday. She was the one who answered the phone. (*Id.* at 1530-31).

Following deliberations, the jury denied any punitive damages, but awarded the estate of Christopher Strom $7 million in compensatory damages. Under the law, there must be some justification beyond sympathy for the dollar amount set by the jury. The Stroms presented no evidence of medical bills, funeral expenses, or other monetary damages that the estate suffered as a result of Christopher's death. Some individual family members testified regarding their personal loss of society and their mental anguish, which is an element of damages under Ohio's wrongful death statute. This testimony was quite moving and reflected, of course, a loss that was tragic and painful. There was, however, no specific testimony regarding the elements of loss of services and/or loss of prospective inheritance.

Under the law, as the jury was instructed, parents are presumed to have suffered damages as a result of the death of their child; siblings, however, must prove their damages. The Court, having originally heard the testimony and having now carefully re-examined the transcript of that testimony, and without in any way diminishing the loss that the Stroms have suffered, nonetheless concludes that the jury's award was excessive.

The Court is of the view that the evidence would support a damages verdict for the estate of Christopher Strom of no more than $5,000,000.00.

Accordingly, the Court will deny the motion for new trial on damages as to the estate of Christopher Strom

conditioned on acceptance of a remittitur in the amount of $2,000,000.00 for a resulting damages judgment of $5,000,000.00 less the $150,000.00 already received from other sources, for a total final judgment against Ford Motor Company in the amount of $4,850,000.00. Failing acceptance of the remittitur, a new trial will be granted Ford on compensatory damages for the estate of Christopher Strom.

The Court will now address Ford's motion as it relates to damages for the estate of Kati Clay.

Delores Clay, Kati's mother, testified during the damages phase. Mrs. Clay is divorced from Kati's father, Arvin Clay; they had two other children, Arvin, Jr. and Elizabeth. Arvin, Jr. is 23 years old and Elizabeth is 18. (Trans. Vol. X at 1538). Mrs. Clay described Kati as compassionate, very creative and possessing a good sense of humor. She loved the earth and the outdoors; she loved music and hoped to study the engineering aspects of music. She was both shy and outgoing; she was able to fit into any situation, but she liked to be "to herself a lot." Mrs. Clay testified that Kati was a "daddy's girl" and could "wrap her father around her little finger." (*Id.* at 1539-40).

On the day of Kati's death, they had had an early supper. They talked about the fact that Chris was moving to California and how much Kati would miss him. (*Id.* at 1541). Mrs. Clay was in bed when the telephone call came about the accident. She woke her husband, Kati's stepfather, to tell him she had to go to the hospital. He, however, stayed home because Delores really did not anticipate that it would be anything serious. (*Id.* at 1542). She apparently did not really believe that "it's that phone call." She remembers taking time to brush her teeth before she left for the hospital. (*Id.* at 1543).

When Mrs. Clay arrived at the hospital, she was escorted into a small room similar to the one John Strom had described. She recalls "wondering why am I here." Then they told her that Kati was dead. She testified that she went to see Kati and that

she wanted to touch her but was afraid. She "wanted to look her over and hold her again." Kati had "big gouges in her body." Mrs. Clay remembers, however, how she noticed Kati's beautiful hands and was reminded how carefully she had always taken care of her hands. (*Id.* at 1543). It is apparent from Mrs. Clay's testimony that she went through these events in what can only be described as a state of disbelief.

After the funeral, Mrs. Clay tried several times to go through Kati's possessions, but could not. Kati's friends would come over and sit in her room. Eventually each family member and friend took something that meant a lot to them. Mrs. Clay kept all of Kati's manuscripts; she also kept a lot of her art work. (*Id.* at 1544).

Kati's sister, Elizabeth, also testified during the damages phase. Elizabeth is two years younger than Kati. (*Id.* at 1546). They were very close and did everything together. Elizabeth testified that she and Kati went to the mall every Saturday, went to movies, and talked. She described Kati as "sassy and she was funny and charming and beautiful." Elizabeth stated that she never met anyone who did not like Kati. (*Id.*).

Elizabeth was asleep when the telephone rang on the night of the accident. Her stepfather came knocking on her door and said they had to go to the hospital. She did not, however, know how serious it was. She asked if she should stay home in case Arvin called. Her dad answered in the negative because "your sister may be dying." (*Id.* at 1546). She recalled that at the hospital they put her "in this little room" and her mom "comes walking in and nodding her head no and she's crying. And that's how I found out." (*Id.* at 1547).

Elizabeth has kept as a memento of her sister an earring that she found in Kati's room. She said that the last thing she had ever given Kati was a pair of dolphin earrings, because Kati liked dolphins. After Kati's death, Elizabeth found one of the earrings and kept it. She has never been able to find its mate. (*Id.* at 1547).

As already noted, parents are presumed to have suffered damages as a result of the death of their child whereas siblings must prove their damages. Here only one parent and one sibling testified as to their losses. The Court, having originally heard the testimony and having now carefully re-examined the transcript of that testimony concludes that the jury's award was excessive. As with the Stroms, the Court in no way means to suggest that the loss suffered by the Clays was not significant and painful. However, the testimony does not support the amount of damages awarded.

The Court is of the view that the evidence would support a damages verdict for the estate of Kathleen Clay of no more than $4,000,000.00.

Accordingly, the Court will deny the motion for new trial on damages as to the estate of Kathleen Clay conditioned on acceptance of a remittitur in the amount of $3,000,000.00 for a resulting damages judgment of $4,000,000.00 less the $150,000.00 already received from other sources, for a total final judgment against Ford Motor Company in the amount of $3,850,000.00. Failing acceptance of the remittitur, a new trial will be granted Ford on compensatory damages for the estate of Kathleen Clay.

III Plaintiffs' Motion for Award of Pre-Judgment Interest (Docket No. 142) and Third-Party Defendant/Counter-Claimant's Motion for an Award of Pre-Judgment Interest (Docket No. 145)

Plaintiffs have filed a motion, pursuant to Ohio Rev. Code § 1343.03(C),[24] for an order awarding prejudgment

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[24] Ohio Rev. Code § 1343.03(C) provides:

> Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the

interest at a rate of ten percent (10%) per annum, from June 18, 1995 to May 29, 1998, the date of judgment. Counter-claimant Slonsky has filed a similar motion. The parties have fully briefed the motion. On August 25, 1998, the Court heard testimony with respect to this issue.

"'The decision as to whether a party's settlement efforts indicate good faith is generally within the sound discretion of the trial court.'" *Cox v. Oliver Machinery Co.*, 41 Ohio App.3d 28, 37, 534 N.E.2d 855 (1987) (quoting *Kalain v. Smith*, 25 Ohio St.3d 157, 159, 495 N.E.2d 572 (1986); *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 482 N.E.2d 1248 (1985)).

In *Kalain*, the Ohio Supreme Court stated:

> The statute was enacted to promote settlement efforts, to prevent parties who have engaged in tortious conduct from frivolously delaying the ultimate resolution of cases, and to encourage good faith efforts to settle controversies outside a trial setting.

Kalain, 25 Ohio St.3d at 159. Similarly, in *Pevko v. Frederick*, 25 Ohio St.3d 164, 495 N.E.2d 918 (1986), the court stated that the purpose of the statute "is to encourage litigants to make a good faith effort to settle their case, thereby conserving legal resources and promoting judicial economy."

The Ohio Supreme Court has also stated that Section 1343.03(C) is a vehicle for addressing the unfairness of allowing a tortfeasor to use funds after a cause of action has accrued. In its syllabus in *Digital & Analog Design Corp. v.*

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court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case.

North Supply Co., 63 Ohio St. 3d 657, 590 N.E.2d 737 (1992),[25] the court stated:

> 1. Prejudgment interest is properly awarded under R.C. 1343.03 on compensatory damages when, because of the failure of a tortfeasor to negotiate in good faith, *it becomes necessary to compensate a plaintiff for delay in receiving compensation* for his injuries, even if that plaintiff has been awarded punitive damages in an amount that otherwise would be sufficient to compensate him for such delay. *(Villella v. Waikem Motors. Inc.* [1989], 45 Ohio St.3d 36, clarified.)[26] (Emphasis and footnote added.)

Other Courts have recognized that Section 1343.03 intends to compensate plaintiffs for the delay in receiving damages.[27]

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[25] Rejected on other grounds by *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 644 N.E.2d 397 (1994).

[26] *Villela* was modified by *Moskovitz v. Mt. Sinai Medical Center*, 69 Ohio St.3d 638, 635 N.E.2d 331 (1994), Syllabus ¶ 2. *Moskovitz* stated that failure to act in good faith is not the equivalent of bad faith.

[27] The Court in *Ellis v. Rugola*, No. 1302, 1987 WL 7180, at *2 (Ohio App. 4 Dist. Mar, 3, 1987), described the equitable considerations which underlie Section 1343.03(C) :

> "High costs and large pretrial outlays are hardly conducive to a 'fair' system of administering the judicial process. Many litigants are keenly aware of the growing costs of litigation and directly rely upon the economic realities to force lower settlements as the legal system more and more becomes a rich man's tool. . . . Making victory expensive is to limit access to the courts. This is an abuse of the system while the abusers are clamoring to be protected, and, when the intent to limit access to the courts results in calculated monetary benefits, the party electing such course ought to be responsible when the opposing side carries the

The *Kalain* court set forth some factors to be considered in determining whether a party has made or failed to make a good faith effort to settle, concluding that a party has *not* so failed

> if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability,

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> proof." (Quoting *Mramor v. Chapman*, 22 Ohio Misc.2d 8, 9, 488 N.E.2d 1257 (1984)).

In *South v. French*, No. C-890187, 1990 WL 67948, at *1 (Ohio App. 1 Dist. May 23, 1990), the Court similarly described the purpose of Section 1343.03(C):

> R.C. 1343.03(C) is intended to remove an unreasonable advantage held by an insurance carrier, particularly when interest rates are high, by which it may benefit from the use of money that should be paid to a party involved in the litigation process. (citing *Kalain v. Smith, supra*).

The purpose of Section 1343.03(C) was similarly described in *Perkins v. Miami Valley Regional Transit Authority*, Nos. 9563, 9696, 1987 WL 5535, at *3 (Ohio App. 2 Dist. Jan. 12, 1987):

> The rationale and purpose behind the concept of prejudgment interest supports our conclusion. The concept of prejudgment interest was enacted by the legislature as a means to promote settlement efforts, to prevent parties who have engaged in tortious conduct from using the judicial process to frivolously delay the ultimate resolution of cases, and to encourage good faith effort to settle outside of a trial setting. *Kalain v. Smith* (1986), 25 Ohio St. 3d, 157, 159. The statute removes some of the advantages of delay for a stakeholder, such as an insurance company, who can continue to use money which should be paid to a plaintiff solely because of the deliberation process. *Mills v. City of Dayton* (1985), 21 Ohio App. 3d 208, 210. The statute seeks to deter defendants who otherwise could force a claimant with a legitimate and real cause of action to file a claim in court, expend large sums of money to hire attorneys, prepare experts, take depositions et cetera, thus driving up the costs of litigation.

> (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party.

Kalain, supra, Syllabus. The court added that, "[i]f a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Id.* "The effect of *Kalain* is to place the burden of proof on a party seeking prejudgment interest." *Moskovitz v. Mt. Sinai Medical Center,* 69 Ohio St.3d 638, 659, 635 N.E.2d 331 *cert. denied*, 513 U.S. 1059 (1994).

> Accordingly, it is incumbent on a party seeking an award to present evidence of a written (or something equally persuasive) offer to settle that was reasonable considering such factors as the type of case, the injuries involved, applicable law, defenses available, and the nature, scope and frequency of efforts to settle. Other factors would include responses — or lack thereof — and a demand substantiated by facts and figures. Subjective claims of lack of good faith will generally not be sufficient. These factors, and others where appropriate, should also be considered by the trial court in making a prejudgment interest determination.

Moskovitz, 69 Ohio St.3d at 659.

At the hearing on this motion, plaintiffs conceded with respect to the *Kalain* factors that Ford had cooperated with discovery and had not engaged in delaying tactics. However, it is plaintiffs' view that Ford did not rationally evaluate the case and, especially, that Ford utterly failed with respect to responding to plaintiffs' good faith settlement offers or making its own good faith offer. Plaintiffs assert that Ford had simply adopted a policy *not* to settle lawsuits wherein plaintiffs were represented by Edgar F. Heiskell III, counsel for the plaintiffs in the instant cases.

Ford, on the other hand, took the position at the hearing that (1) since plaintiffs concede that Ford cooperated in discovery and did not unduly delay the proceedings, that is the end of the analysis since, in its view, failure with respect to all of the factors set forth in *Kalain* must be established by plaintiffs; (2) that, in any event, it had an "objectively reasonable" belief that it was not liable to the plaintiffs and, therefore, did not need to make its own settlement offer; and (3) that plaintiffs' counsel did not negotiate in good faith with Ford.

As a threshold matter, this Court rejects Ford's stance that its cooperation in discovery and in moving the case along is dispositive with respect to the *Kalain* factors. It is disingenuous to argue that such action would insulate a tortfeasor from an award of prejudgment interest, especially in view of the *two*-fold purpose of the statute which includes *both* encouragement of settlement efforts *and* conservation of resources. Only the latter purpose would, arguably, be served by Ford's having cooperated during the pre-trial stages of the case; the former purpose would be completely unsatisfied. If Ford's position were true, all that would ever be required of a defendant to avoid prejudgment interest would be cooperation during discovery. Lawyers could eviscerate Section 1343.03(C) by merely acting professionally.[28]

The Court must decide whether the respective parties made good faith efforts to settle the claims involved in this case.

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[28] The Court's view is supported by *Fiorini v. Whiston*, 92 Ohio App.3d 419, 430-31, 635 N.E.2d 1311 (1993), which stated that to establish that a party acted in good faith "[a]ll four *[Kalain]* criteria must be met." Further, this Court's research has not found, and Ford has not cited, any Ohio case where mere cooperation in discovery or lack of causing undue delay has, by itself, gotten a tortfeasor off the hook with respect to prejudgment interest. Courts routinely examine the question of the good faith efforts of the respective parties when determining whether to award prejudgment interest, without making any mention of other pre-trial actions by the parties or their counsel.

To that end, the following findings of fact are made, gleaned from the evidence presented at the August 24, 1998 hearing.[29] At that hearing, counsel for the plaintiff, Edgar F. Heiskell III, testified regarding his efforts at settling the case. Ford presented the testimony of attorney Edward C. Stewart.

Mr. Heiskell testified that in the summer of 1996 he was contacted by attorney Anthony Tuccillo from Akron, Ohio, who inquired whether Heiskell would be interested in representing Delores Clay and John Strom. At this time, Mr. Heiskell had already been involved in Bronco II litigation since at least 1992. In particular, he had represented a personal friend who had been ejected and seriously injured during a Bronco II rollover, despite having used his seatbelt. Mr. Heiskell settled that case in 1992 or 1993 for "a significant sum" after negotiations with Mr. John Mellen, Ford's in-house counsel. He had subsequently been involved in several more cases before Mr. Tuccillo contacted him about the Clay/Strom matter.

Mr. Heiskell was aware that both Mr. Mellen and Mr. Ed Stewart, another of Ford's counsel, preferred "early evaluation" of cases. Mr. Heiskell thought the Clay/Strom incident lent itself to such evaluation because the rollover accident had been very well documented from the start and the accident vehicle had been preserved.

On August 24, 1996, Mr. Heiskell sent packets of materials to Mr. Mellen to aid in the early evaluation. (*See* Plaintiffs' Hearing Exhibits 1-5). The packets consisted of several letters and attached materials relating to the accident in general[30] and each decedent in particular.[31] A few days later, the

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[29] At the time that this opinion was written, the transcript of the hearing had not yet been filed making reference to the transcript impossible.

[30] This general information included (1) Ohio Traffic Crash Report; (2) Report of Peace Officer re: urinalysis; (3) Towed Vehicle Report; (4) Witness Statement -- Mary Ann Mills; (5) Listing of Witnesses;

packets were supplemented with materials that had not been immediately available. (*See* Pl. Exh. 6 [08/28/96] and Exh. 7 [09/17/96]). In the letters of August 24, 1996, Mr. Heiskell informed Mr. Mellen that he represented Mrs. Clay and Rev. Strom, parents and fiduciaries of the estates of their deceased children who had been killed in a Bronco II rollover on June 18, 1995. He also informed Mr. Mellen that the vehicle had been driven by a third person. Mr. Heiskell urged Mr. Mellen to give the claims "good-faith consideration of settlement [in order to] obviate the need for [] filing civil action complaints[.]" (Pl. Exh.1). Mr. Heiskell supplied Mr. Mellen with drafts of the two complaints which would be filed. At this point, Mr. Heiskell

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(6) Witness Statement -- Lisa Shamshak; (7) Witness Statement -- Edward Mills, Jr.; (8) Diagram Reference Points; (9) Akron Police Dept. D.U.I. Arrest Report; (10) Akron P.D. Fatal Injury Report of June 26, 1995; (11) Akron P.D. Fatal Injury Report of June 19, 1995; (12) Interview of Medical Personnel -- Brenda Krupar; (13) Interview of Medical Personnel -- Grady, Woody, Washington and Willoughby; (14) Akron P.D. Dispatch Card; (15) Akron P.D. Fatal Accident Scene Checklist; (16) Akron P.D. Evidence Report; (17) Traffic Citation No. A 074495; (18) Municipal Court Complaint re Victim Clay; (19) Municipal Court Complaint re: Victim Strom; (20) Coroner's Report re: Kathleen Clay; (21) Coroner's Report re: Christopher Jon Strom; (22) Chain of Custody Form; (23) SmithKline Beecham Lab Report (negative for LSD); (24) Akron P.D. Forensics Lab Report (negative for ethanol); (25) Drug Screen Report/Patient Detail Report for multiple drugs (negative); (26) Drug Screen Report/Patient Detail Report for LSD (negative); (27) Laser Copies of Photo Proofs of Accident Scene Taken by Akron P.D.; and (28) Laser Copies of Photos of Bronco II.

[31] "Each individualized package contain[ed] a descriptive letter introducing the deceased victim and discussing economics relative to the issue of damages; a draft complaint; and a separate letter making a formal demand for settlement." (Pl. Exh. 1 at 2). A demand of $1.2 million was made on behalf of each estate. (Pl. Exh. 4, 5).

was also of the view that both decedents had been wearing their seatbelts and that there had been inertial release.[32]

Mr. Heiskell received no response whatsoever from Ford or its attorneys. On September 17, 1996, he sent a fax to Mr. Mellen asking for confirmation that the package sent on August 24, 1996 had been received and whether Ford intended to make an early evaluation (Pl. Exh. 8). At the hearing Mr. Heiskell testified that he spoke with Mr. Mellen on or about September 23, 1996, and that during that conversation Mellen told Heiskell that Ford did not intend to settle any of his cases because it did not want to "incentivize" him.[33]

By letter dated September 23, 1996, Ford's Claims Analyst Edward Drabczyk thanked Mr. Heiskell for the August 24th letter and asked that several items[34] be provided "as quickly

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[32] This, however, later proved not true and no such claim was ever made to the jury. In fact, the jury was told that the decedents had not been wearing seatbelts although the driver and the front-seat passenger had been. In any event, at this point in the process Mr. Steward informed Mr. Heiskell that one theory of defense which Ford intended to pursue was failure to wear seatbelts, resulting in lack of proximate cause. Heiskell did not see this as a serious obstacle because he was aware that Ford had already lost some cases where victims had been wearing seatbelts.

[33] The date of September 23, 1996 is confirmed by a letter from Heiskell to Mellen dated September 30, 1996 wherein Heiskell makes reference to Mellen's "statement to me *last Monday* that no offers were forthcoming [in two other cases] because Ford did not to 'incentivize' me in pursuing Bronco II claims 'up and down the East Coast[.]'" (Pl Exh. 10, emphasis added). The Court takes judicial notice of the fact that September 23, 1996 fell on a Monday.

[34] The items requested were:

(1) Any reports or records from fire departments, emergency medical services, and other such agencies who responded to the scene of the incident.

as possible" in order "[t]o assist us in a more timely, accurate evaluation of this claim[.]" (Pl. Exh. 9). It is abundantly clear from this request that Mr. Drabczyk had never looked at the materials sent by Mr. Heiskell on August 24, 1996. *Compare* listing in Note 30 with listing in Note 34.

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(2) All documents reflecting repairs service and maintenance of the vehicle.

(3) Copies of all photographs and videotapes of the vehicle and accident scene.

(4) All documents regarding purchase of the vehicle.

(5) The names, address and telephone numbers of persons with knowledge of relevant facts.

(6) The current location of the vehicle and whether or not it is available for inspection by Ford.

(7) Has the vehicle been examined by any independent experts engaged by you? If so, by whom?

(8) Please be kind enough to forward us any expert reports in your possession in support of your position that there was a defect in the vehicle in question.

(9) All documents related to any insurance claims or benefits as a result of the incident including any investigative and appraisal reports.

(10) A detailed description of the events surrounding the incident, the alleged defect, and the damage amount.

(11) A detailed description of prior accidents involving this vehicle, including the parties involved and damages to the vehicle.

(12) All documents supporting damages including settlement demand.

(13) Any other documentation that might assist Ford in evaluating this claim. (Pl. Exh. 9).

On September 30, 1996, Mr. Heiskell wrote again to Mr. Mellen to advise that he was filing wrongful death lawsuits that day on behalf of the Clay and Strom estates. He stated: "Two events have occurred which have led me to conclude that Ford is not making, and cannot be counted upon to make, a ***bona fide*** effort to evaluate these claims for settlement prior to trial." The first event related to two other cases where Mr. Heiskell represented plaintiffs.[35] The second related to the Clay/Strom matter and was set forth by Mr. Heiskell as follows:

> The second event is the form letter I received from Edward Drabczyk of Ford's Office of General Counsel on September 28. Although Mr. Drabczyk acknowledges (30 days after it was sent to your office) receipt of my letter of August 24, his listing of requested documents completely ignores the 28 separate documents (including police reports, witness statements, drug/alcohol screen reports, medical personnel interviews and the more than 50 laser copies of photographs) that were sent to you.
>
> Thus, it is clear to me that Ford has no intention of making an early evaluation of settlement possibilities of these claims, nor could my clients expect any settlement proposal to be reasonable, given Ford's stated intentions and actions.
>
> You will soon see that Ford's efforts to avoid "incentivizing" me by making fair and reasonable efforts to settle those cases which are amenable to settlement has had an effect precisely opposite that which was apparently intended.

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[35] With respect to these cases (*Gamblin* and *Asterino*) he referred to a conversation which he had had with Mr. Mellen the previous Monday wherein Mellen had stated that "Ford did not want to 'incentivize' [him] in pursuing Bronco II claims 'up and down the East Coast[.]'" (Pl. Exh. 10).

(Pl. Exh. 10). On August 7, 1997, Mr. Heiskell corresponded with Ford's local counsel, Elizabeth B. Wright.[36] (Pl. Exh. 11). He sent Ms. Wright the reports of a C.P.A. regarding the net present value of the lost income capacity of the two decedents. Mr. Heiskell also reminded Ms. Wright that he had suggested to Mr. Stewart that the case might be mediated but that he never got a response.

On August 12, 1997, Mr. Heiskell faxed a message to Mr. Stewart, apparently in response to Stewart's request for settlement figures for each of the cases where Mr. Heiskell represented plaintiffs. (Pl. Exh. 12, 13). In that correspondence, Heiskell indicated that the Clay and Strom cases could be settled for $750,000.00 each. Heiskell also noted that he had been trying to communicate with Mr. Mellen "in recent weeks, to no avail." On cross-examination, when asked why this settlement demand, which was supposed to be "global," did not include the *Goff II* litigation,[37] Mr. Heiskell

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[36] By this date, Ford had already filed a Third Party Complaint against the driver of the vehicle, William R. Slonsky. (*See* Docket No. 13). Attorney Donald P. Wiley appeared on behalf of Slonsky on March 25, 1997. (*See* Docket No. 16). However, extensions were granted for the filing of an answer. Slonsky's Answer was filed on April 25, 1997, joined with a Counterclaim against Ford. (*See* Docket No. 22). Ford answered the counterclaim on May 5, 1997. (*See* Docket No. 24). The next day, May 5, 1997, the Court conducted the second status conference. At that conference, plaintiffs' counsel represented that they would undertake Slonsky's representation and would prosecute his counterclaim. (*See* Order, May 5, 1997, Docket No. 25).

[37] There were two *Goff* cases. In the first, plaintiff Goff settled with Ford in 1993 or 1994 for $400,000, apparently because of the strength of the position of Ford's expert, David Bickerstaff. Goff was only the second Bronco II plaintiff that Mr. Heiskell had represented. Mr. Heiskell later had reason to believe that Ford had paid Bickerstaff to perjure himself and/or had purposefully withheld two critical documents. Therefore, a second *Goff* case was brought, a putative

stated that he was under the impression that Ford had no intention to settle *Goff* under any circumstance and that he, therefore, did not include a demand for that case. Mr. Stewart apparently called Heiskell and asked for a figure for *Goff*. Heiskell said it had to be at least $1 million. Since that was out of the question, the global settlement never occurred because Ford took a "settle all or settle none" position.

On January 9, 1998,[38] Mr. Heiskell wrote again to Mr. Stewart with a "global" settlement demand. (Pl. Exh. 14). This time, he asked for only $550,000 for each estate. Mr. Heiskell urged Ford to see these demands as "eminently fair and reasonable[.]" He further noted that

> [b]y settling now, Ford will be (1) avoiding at least $2 million in litigation costs, (2) avoiding the likelihood of unfavorable published opinions in *Gamblin, Moya* and *Martin*, (3) eliminating the possibility that one or more of these cases could result in a runaway verdict involving huge punitive damages, and (4) getting rid of tens of millions in contingent liabilities.

Apparently, there was no response from Mr. Stewart, although the offer of settlement remained open until January 16, 1998.

Finally, on May 5, 1998, after the second day of the trial, plaintiffs and Slonsky presented a demand to Mr. Stewart via the front desk of Stewart's hotel in Cleveland, Ohio. (Pl. Exh. 15). Each estate demanded $1.5 million, and Slonsky demanded $500,000. These offers were to remain open "to and until such

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class action on behalf of two classes: persons who had settled trials on the strength of Bickerstaff's expected testimony and persons who had lost after trials where Bickerstaff testified. *Goff II* is still pending, although not as a class action, awaiting a ruling on Ford's motion for summary judgment.

[38] At this time, the Court had already set a trial date for May 4, 1998.

time as the Court has ruled on motions at the conclusion of plaintiffs' case[.]" There was no response from Mr. Stewart.[39]

When examined by Mr. Grisi, Slonsky's counsel, Mr. Heiskell stated that in August of 1997, when he was consulting with Mr. Stewart regarding settlement of the *Clay/Strom* cases, he was Slonsky's counsel of record. (*See* Order of May 6, 1997, Docket No. 25; Attorney Appearance by Grisi, April 16, 1998, Docket No. 45).

On cross-examination, Mr. Heiskell admitted that May 5, 1998 was the first time an express settlement demand had been made on behalf of Slonsky; however, he stated that he always contemplated (at least once Slonsky was brought into the case by Ford) that Slonsky would be included in any settlement. He did admit that he never told Mr. Stewart that.

At the hearing, Mr. Heiskell testified that, in a class action in the U.S. District Court for the Eastern District of Louisiana, Ford had been required to disclose the number of Bronco II cases it had settled, as opposed to tried. Through December of 1994, Ford had settled 334 cases, whereas it had tried 13 cases, of which it had prevailed in 10. Heiskell believes that the number of settled cases has now increased to over 400. Of the 21 lawsuits filed by Mr. Heiskell on behalf of various plaintiffs throughout the country, 13 have been settled. Although his memory of the dates of settlement was not precise at the hearing, Mr. Heiskell estimated the following dates:

Diaz v. Ford, Circuit Court of Monongalia County, West Virginia — December, 1993

Goff v. Ford, Circuit Court of Kanawha County, West Virginia — July, 1994

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[39] On re-cross-examination, Mr. Heiskell stated that between the liability and damages phases of the trial, the demand for settlement for the entire case increased to $20 million.

Cochran v. Ford, Circuit Court of Kanawha County, West Virginia — Spring, 1995

Hickman v. Ford, Circuit Court of Kanawha County, West Virginia — Spring, 1995

Jackson v. Ford, Middle District of Florida — 1995, possibly 1996

Young v. Ford, Northern District of West Virginia — May or June, 1996[40]

Bennett v. Ford, Eastern District of Virginia — Summer, 1996

Mojher v. Ford, Southern District of West Virginia — Summer 1996[41]

Dillon v. Ford, Southern District of West Virginia — November 1996

Rhodes v. Ford, Court of Common Pleas, Kershaw County, South Carolina — before the end of 1996

Asterino v. Ford, Southern District of Ohio — Spring, 1997

Wren v. Ford, Southern District of West Virginia — August 1997

Cassella v. Ford, District of Massachusetts — April 9, 1998

Therefore, of the 13 of Mr. Heiskell's cases which Ford has settled, eight (8) settled before September 23, 1996 (the day the non-"incentivize" policy was articulated) and five (5) settled since then. In addition, Mr. Heiskell testified that he has

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[40] This case involved a Ford Ranger pickup truck.

[41] Mr. Heiskell clarified this by stating that this actually could have settled as early as late 1993 and as late as mid-1995.

actually gone to trial against Ford a few times: (1) the *Gamblin* case which resulted in a mistrial in early 1996 and was re-tried to a defendant's verdict in May of 1997; the case is now on appeal; (2) the *Martin* case which was tried to a plaintiff's verdict in November of 1997, but where the judge granted JNOV, a decision which is now under reconsideration on plaintiff's motion; and (3) the *Clay* and the *Strom* cases in this Court.

On cross-examination, Mr. Heiskell acknowledged that he has solicited cases from persons whom he knows to have been involved in Bronco II accidents. For example, the *Hickman* and *Martin* cases originated in that manner. Heiskell noted that the letters to Mr. Hickman and Mr. Martin were labeled "advertising material." (Def. Exh. G, H).

Mr. Heiskell also acknowledged on cross-examination that he had "threatened" (Ford's word) to go to the media, to write to the National Highway Traffic Safety Administration ("NHTSA"), to do a nationwide case solicitation, to brief attorneys for insurance companies regarding the possibility of subrogation rights with respect to Bronco II rollover accidents for which they had paid claims, and to contact attorneys general throughout the United States about the possibility of lawsuits to recover state funds paid out for medical costs resulting from Bronco II rollovers. He did, in fact, contact NHTSA (*See* Def.

Exh. I)[42] and his own insurance company, State Farm. *(See* Def. Exh. M).[43]

Although no one used the word at the hearing, it was clear that Ford was implying that Mr. Heiskell was attempting to "blackmail" it into settling his cases. Mr. Heiskell was steadfast that he did not view his communications as "threats" since he had actually acted upon some of them, but that he was and still is trying to get Ford to acknowledge its "arrogance" in having a policy not to settle any of Heiskell's cases.[44]

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[42] Mr. Heiskell wrote to the Administrator of NHTSA requesting that the Bronco II investigation conducted between 1983-90 be re-opened because Ford had "conceal[ed] the Bronco II rollover defect which is killing and maiming thousands of American men, women and children." (Def. Exh. I). He further stated: "We do not yet know the extent, if any, to which your predecessors at NHTSA may have been in complicity with Ford and ignored the evidence that Ford was engaged in a massive cover-up of the Bronco II problem." (*Id.*). He stated that if NHTSA were to "default in discharging . . . its solemn duty, our next recourse would be to ask Congress to convene a hearing on the whole sordid affair." (*Id.*).

[43] A fax from Mr. Heiskell to Mr. Stewart dated January 22, 1998, stated: "Your client's arrogance has its consequences. Someday, someone on Ford's board of directors is going to question John Mellen's judgment in inviting this kind of problem." (Def. Exh. M). The "problem" referred to was laid out in an attached copy of a fax Heiskell had sent to Charles Stuckey of State Farm Insurance Co. wherein he explained his view that"State Farm can and should recover its losses against this $27 Billion-a-year automaker that has tried to deceive everyone about the rollover propensity of this popular sport utility vehicle [the Bronco II]." (*Id.*).

[44] In fact in a January 16, 1998 fax with an angry tone addressed to Mr. Stewart, Mr. Heiskell stated:

> I very much regret that Ford has elected to make no response to my offer to settle the various cases in my inventory.
>
> You had led me to believe that Ford "is always interested"

Also on cross-examination, Mr. Heiskell admitted that during their exchanges regarding the possibility of settling the *Clay/Strom* cases, Mr. Stewart told him, *inter alia*, that Ford intended to rely on the following defenses: (1) that the decedents were not wearing seatbelts, which was the proximate cause of their deaths; (2) that an EMS worker would testify that the driver told her he had been suicidal; (3) that Strom and others in the vehicle were using LSD;[45] 4) that the decedents were emancipated, unemployed adults with no claims for past or future lost wages; (5) that there is no evidence of conscious pain and suffering of either decedent; and (7) that the only basis for damages is the grief of the surviving family members.[46]

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in settling cases; however, Ford's failure to make any counter-proposals whatsoever in *any* of the cases makes it clear that it has another agenda in mind.

As consequences of what I consider to be Ford's bad faith, you can expect me to follow thru [sic] with the measures I specifically described for you last week. I will be joined by several firms not previously involved in Bronco II litigation.

You'll want to budget your time wisely. Ford's going to have much to which to respond, beginning with new motions to compel. OGC [Office of General Counsel] makes the tobacco executives look like a bunch of boy scouts.

(Def. Exh. L).

[45] The Court notes, however, that there is absolutely *no* evidence in the record that Slonsky or either of the decedents were using LSD, even though there was the admission that the front seat passenger, whose mother owned the Bronco II, was using it. In effect, Slonsky was the "designated driver."

[46] This, however, is an element of damages under Ohio's wrongful death statute. The addition of this element to the statute in the early 1980s significantly changed the nature of wrongful death actions in Ohio.

Ford's only witness at the hearing on August 25, 1998 was Mr. Edward Stewart. He insisted that he had always told Mr. Heiskell that each of his cases would be separately examined on both its factual and legal basis with respect to settlement possibilities. He was of the view that plaintiffs here were never reasonable in their demands because they never presented "facts and figures" to substantiate the monetary amounts.

The Court notes that, although Ford's General Counsel Mr. Mellen was admittedly the ultimate decision-maker with respect to settlement of the *Clay/Strom* cases, Ford opted not to present him as a witness at the hearing and had previously vigorously resisted post-verdict attempts by the plaintiffs and the counter-claimant to depose Mellen in order to explore the question of Ford's good faith.

Having considered the testimonial evidence and the parties' respective arguments, the Court is of the view that the plaintiffs, Delores Clay and John Strom, have established that they acted in good faith to try to settle their cases from early on *and* that Ford failed to act in good faith in its refusal to make any offer of settlement prior to the commencement of the trial.[47]

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[47] Before the trial commenced, Ford's counsel were on notice from its own seatbelt expert that there was no evidence to suggest that Slonsky, the alleged suicide driver, was not wearing a seatbelt. Moreover, Lance (the frontseat passenger) and a driver who was closely following the Slonsky vehicle, had given vivid pretrial testimony by way of deposition that she had stopped Slonsky from jumping off an overpass in his post-accident attempt to commit suicide. The reliance of Ford upon the EMS worker who arrived at the scene later about the alleged pre-accident suicide efforts of Slonsky was simply not credible and that fact should have been obvious to Ford's counsel prior to the commencement of the trial. Ford's reliance on the EMS worker's testimony concerning suicide on the part of Slonsky does not in this Court's view qualify as a good faith basis for failing to make an offer of settlement. The first offer of settlement by Ford came after the jury, in the bifurcated

They are each entitled to prejudgment interest pursuant to Ohio Rev. Code § 1343.03).03(C) and the same shall be awarded. Accordingly, Docket No. 142 is GRANTED.

On the other hand, there is no proof that counter-claimant Slonsky made timely good faith efforts to settle his counterclaim. When he finally did make an actual demand during trial, there is no evidence that Ford failed to act in good faith by not accepting his offer. By that time, the record already suggested possible conflicting testimony regarding his purported suicide attempt(s). It was not unreasonable for Ford to take the position that the jury might believe its evidence and disbelieve Slonsky's evidence. Slonsky is not entitled to prejudgment interest. Accordingly, Docket No. 145 is DENIED.

The Court now turns to the calculation of the prejudgment interest in the event either or both plaintiffs elect to accept the remittitur. The prejudgment interest will be calculated on the net judgment for each of the two estates. With the acceptance of the remittitur, the Strom estate will be entitled to the sum of $4,850,000.00 plus the prejudgment on that amount. With the acceptance of the remittitur, the Clay estate will be entitled to the sum of $3,850,000.00 plus the prejudgment interest on that amount.

Under Ohio law, prejudgment interest is calculated at 10% per annum from the date of the event to the date of the judgment. As the former date is June 18, 1995 and the date of the judgment was May 29, 1998, the period of time for the calculation is 20 days short of three years. To compute the interest, the Court has divided 20 by 365 and the result is 0.0548. The annual interest for the Strom estate, assuming the remittitur is accepted, is $485,000.00. Multiplying that number by 0.0548 leads to the sum of $26,578.00 which will be subtracted from $1,455,000.00, which is three years' interest.

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proceeding, had found against Ford on the issue of liability.

The total prejudgment interest that will be awarded the Strom estate will be S1,428,422.00, in the event the remittitur of $2,000,000.00 is accepted, for a total revised judgment of $6,278,422.00.

The annual interest for the Clay estate, assuming the remittitur is accepted, is $385,000.00. Multiplying that number by 0.0548, which represents the fraction created by dividing 20 by 365, leads to $21,098.00 which will be subtracted from $1,115,000.00, which is three years' interest. The total prejudgment interest that will be awarded the Clay estate will be $1,133,902.00, in the event the remittitur of $3,000,000.00 is accepted, for a total revised judgment of $4,983,902.00.

IV. Summary Conclusion re: Docket Nos. 142, 145, 148, 149

Ford's motion for judgment as a matter of law (Docket No. 149, Part 1) is DENIED. Further, Ford's motion for a new trial as to liability (Docket No. 149, Part 2) is DENIED.

Ford's motion for new trial on damages as to Slonsky is DENIED, conditioned on Slonsky's acceptance of a remittitur in the amount of $2,000,000.00 for a resulting damages judgment against Ford Motor Company in the amount of $1,500,000.00. Failing such acceptance, Ford's motion for a new trial on Slonsky's damages will be granted. (Docket No. 148, parts I and 2).

Plaintiffs Delores Clay and John Strom, as administrators for the estates of their respective decedents, are each entitled to prejudgment interest at ten percent (10%) per annum pursuant to Ohio Rev. Code § 1343.03(C). Accordingly, Docket No. 142 is GRANTED.

Ford's motion for new trial on damages as to the estate of Christopher Strom is DENIED, conditioned on acceptance of a remittitur in the amount of $2,000,000.00, for a resulting damages judgment of $5,000,000.00 less the $150,000.00 already received from other sources, for a total final judgment

against Ford Motor Company in the amount of $6,278,422.00, which includes prejudgment interest in the sum of $1,428,422.00. Failing acceptance of the remittitur, Ford's motion for a new trial on compensatory damages for the estate of Christopher Strom will be granted. (Docket No. 148, parts 1 and 2).

Ford's motion for new trial on damages as to the estate of Kathleen Clay is DENIED, conditioned on acceptance of a remittitur in the amount of $3,000,000.00, for a resulting damages judgment of $4,000,000.00, less the $150,000.00 already received from other sources, for a total final judgment against Ford Motor Company in the amount of 4,983,902.00, which includes prejudgment interest in the sum of $1,133,902.00. Failing acceptance of the remittitur, Ford's motion for a new trial on compensatory damages for the estate of Kathleen Clay will be granted. (Docket No. 148, parts 1 and 2).

Counter-claimant William R. Slonsky is not entitled to prejudgment interest. Accordingly, Docket No. 145 is DENIED.

The Court has prepared documents to be executed by the plaintiffs and by the counterclaimant Slonsky in which the remittitur is either accepted or rejected. Those documents are attached as Appendices 1, 2, 3, 4, 5 and 6. The Court requests that the plaintiffs Strom and Clay and the counter-claimant Slonsky file either an acceptance or rejection of the remittitur by no later than September 11, 1998.

If one or both plaintiffs Strom and Clay or counter-claimant Slonsky fall to respond by either accepting or rejecting the remittitur by 4:00 p.m. Monday, September 14, 1998, the Court will grant the defendant Ford Motor Company a new trial as to the non-responding party on the issue of compensatory damages.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
U.S. District Judge

APPENDIX E

98-4230
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOLORES CLAY, AS ADMINISTRATRIX OF THE ESTATE OF KATHLEEN P. CLAY, ET AL.,	)	
Plaintiffs-Appellees,	)	
v.	)	ORDER
FORD MOTOR COMPANY, A DELAWARE CORPORATION,	)	
Defendant-Appellant,	)	
WILLIAM R. SLONSKY,	)	
Defendant-Appellee.	)	

BEFORE: RYAN, MOORE, and GIBSON,[1] Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

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[1] Hon. John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Ryan would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

Filed: Aug. 15, 2000